

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 644

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

vs.

CEMENT INVESTORS, INC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT

---

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1941  
CERTIORARI GRANTED MARCH 9, 1942

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**IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT.**

**No. 2270.**

**COMMISSIONER OF INTERNAL REVENUE, PETITIONER,**

**VS.**

**CEMENT INVESTORS, INC., RESPONDENT.**

**[Petitioner's designation of record.]**

**Robert B. Cartwright, Clerk  
United States Circuit Court of Appeals  
For the Tenth Circuit  
Denver, Colorado**

**Sir:**

With further reference to our telegram of February 17, 1941, you are now advised that in the case of Commissioner v. Cement Investors, Inc., B. T. A. Docket No. 97219, there shall be printed the entire transcript of record as filed and as transmitted to you from the Clerk of the United States Board of Tax Appeals by letter dated February 14, 1941. The record to be printed shall include all of the matter contained in the docket entries as set forth in the list attached to the letter from the Clerk of the Board of Tax Appeals of February 14, including stipulation of facts, statement of points filed by petitioner, and all matters referred to both by the praecipe filed by the Commissioner of Internal Revenue and the praecipe filed by the taxpayer, also the agreed designation of additional portions of record to be contained in record filed by the taxpayer.

**Respectfully,**

**SAMUEL O. CLARK, JR.,**

**Samuel O. Clark, Jr.,**

**Assistant Attorney General.**

**Filed February 27, 1941, Robert E. Cartwright, Clerk.**

## UNITED STATES BOARD OF TAX APPEALS.

CEMENT INVESTORS, INC., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 97219.

Appearances—For Taxpayer: James B. Grant, Esq., Stephen H. Hart, Esq. For Comm's.: Angus R. Shannon, Jr. Esq., Carroll Walker, Esq.

## Docket Entries:

1939

- Feb. 24—Petition received and filed. Taxpayer notified. (Fee paid).
- Feb. 24—Copy of petition served on General Counsel.
- Apr. 18—Answer filed by General Counsel.
- Apr. 18—Request for Circuit hearing in Denver, Colorado filed by General Counsel.
- Apr. 26—Notice issued placing proceeding on Denver, Colorado, calendar. Answer and request served.
- Jul. 28—Hearing set for Sept. 18, 1939, in Denver, Colorado.
- Sept. 21—Hearing had before Miss Harron on merits. Motion granted to file the amended petition. Copy served. Stipulation as to facts filed. Petitioner's brief due Nov. 6, 1939. Respondent due December 6, 1939—Petitioner's reply Dec. 21, 1939.
- Oct. 10—Transcript of hearing of Sept. 21, 1939, filed.
- Oct. 25—Answer to amended petition filed.
- Oct. 31—Copy of answer to amended petition served on taxpayer.
- Nov. 6—Brief filed by taxpayer. 11/7/39 copy served.
- Nov. 27—Motion for extension to Jan. 6, 1940 to file brief filed by General Counsel. 11/28/39 granted and petitioner's reply brief due Feb. 6, 1940.

1940

- Jan. 5—Motion for extension to Jan. 22, 1940 to file brief filed by General Counsel. 1/6/40 granted. Petitioner's reply due Feb. 21, 1940.
- Jan. 22—Brief filed by General Counsel.
- Feb. 23—Reply brief filed by taxpayer. 2/24/40 copy served.
- Aug. 8—Memorandum findings of fact and opinion rendered, Harron, Div. 13. Decision will be entered under Rule 50.
- Sept. 4—Agreed computation of deficiency filed.
- Sept. 6—Decision entered, Harron, Div. 13.
- Nov. 26—Petition for review by U. S. Circuit Court of Appeals, 10th Circuit, with assignments of error filed by General Counsel.
- Dec. 2—Proof of service filed.
- Dec. 5—Proof of service filed by General Counsel.
- Dec. 21—Motion for extension to Feb. 24, 1941 to prepare and transmit record filed by General Counsel.
- Dec. 21—Order enlarging time to Feb. 24, 1941 to prepare and transmit record entered.

1941

- Jan. 8—Statement of points filed by General Counsel with affidavit of service thereon.
- Jan. 8—Designation of portions of record to be contained in record filed by General Counsel, with affidavit of service thereon.
- Jan. 21—Agreed designation of additional portion of record to be contained in record filed by taxpayer with affidavit of mailing attached.
- Jan. 23—Proof of service of filing designation of record filed by General Counsel.
- Jan. 23—Proof of service of filing statement of points filed by General Counsel.

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#### Amended Petition.

The above-named Petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in notice of deficiency, IT:R:E5:6-EFC-90D, dated January 28, 1939, and as a basis of its proceeding, alleges as follows:

1. The Petitioner now is, and during all the times herein mentioned has been, a corporation duly organized and existing under the laws of the State of Delaware, with its principal office and place of business at 104 Boston Building, Denver, Colorado. The corporation and personal holding company income tax returns here involved were filed with the Collector of Internal Revenue for the District of Colorado, at Denver, Colorado.

2. The notice of deficiency, a copy of which is attached hereto and marked "Exhibit A," was mailed to Petitioner on January 28, 1939.

3. The tax in controversy consists of income tax, excess profits tax and personal holding company surtax for the calendar year 1936. The Respondent by said notice of deficiency has determined a total deficiency of \$16,985.03, consisting of \$8,427.89 income tax, \$2,381.88 excess profits tax, and \$6,175.26 personal holding company surtax. Petitioner admits a deficiency of \$486.43 income tax and \$2,072.59 personal holding company surtax, a total admitted deficiency of \$2,559.02. The amount in controversy, therefore, is a total tax of \$14,426.01, consisting of \$7,941.46 income tax, \$2,381.88 excess profits tax and \$4,102.67 personal holding company surtax.

4. The determination of the deficiency is based upon the following errors:

A. The holding of Respondent that the surrender by the Petitioner of \$44,000.00 face value of Colorado Industrial Company 5% Bonds in exchange for \$17,600.00 face value of 5% Income Mortgage Bonds and 880 shares of capital stock of The Colorado Fuel and Iron Corporation constituted a taxable exchange.

B. The holding of Respondent that the market value of the securities received at the date of the exchange was \$85.25 for each \$100.00 face value of 5% income mortgage bonds and \$32.25 for each share of capital stock, a total of \$43,384.00.

5. The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

A. On March 1, 1935, there was filed in the District Court of the United States, for the District of Colo-



rado, In the Matter of The Colorado Fuel and Iron Company and Another, Debtors, Consolidated Cause No. 8081, a Plan of Reorganization. At that time the Colorado Fuel and Iron Company had outstanding its own General Mortgage 5% Bonds, preferred stock and common stock, and it was also the guarantor on the First Mortgage 5% Bonds of the Colorado Industrial Company, a subsidiary corporation.

On April 25, 1936, the Court approved the Plan of Reorganization, which provided that a new company should be organized with an authorized capital of 1,000,000 shares of stock and \$11,053,200.00 5% Income Mortgage Bonds. The new company was to assume the payment of the General Mortgage 5% Bonds of the Colorado Fuel and Iron Company, which were not disturbed; was to issue \$11,053,200.00 of its Income Mortgage Bonds and 552,660 shares of its stock, in exchange for the First Mortgage 5% Bonds of the Colorado Industrial Company, in the ratio of \$400.00 face value of new bonds and 20 shares of stock for each \$1,000.00 face amount of Colorado Industrial Company bonds and was to issue to preferred and common stockholders of the Colorado Fuel and Iron Company warrants to purchase certain specified amounts of stock of the new company at \$35.00 per share on or before February 1, 1950; 315,379 shares of stock of the new company being reserved for this purpose.

In pursuance of the Plan of Reorganization, the Colorado Fuel and Iron Corporation was organized under the laws of the State of Colorado, and on June 20, 1936, the Court directed the Colorado Fuel and Iron Company, the Colorado Industrial Company, Arthur Roeder, Trustee, and The New York Trust Company, as Trustee under the Colorado Industrial Company Mortgage securing its First Mortgage 5% Bonds, to convey to The Colorado Fuel and Iron Corporation all of their right, title and interest in all of the assets of the Colorado Fuel and Iron Company and the Colorado Industrial Company. Simultaneously therewith, The Colorado Fuel and Iron Corporation was directed to deliver to, or on the order of, the Reorganization Managers, \$11,053,200.00 of its Income Bonds, 552,660



shares of its stock and warrants representing the right to purchase 315,379 shares of its stock. This order further provided that upon the surrender of the outstanding bonds of Colorado Industrial Company to the Reorganization Managers, they should distribute to the holders thereof the Income Mortgage Bonds and capital stock of The Colorado Fuel and Iron Corporation to which they were entitled, respectively, under the Plan. And The New York Trust Company, Trustee, was directed to execute and deliver to The Colorado Fuel and Iron Corporation a satisfaction and discharge of the First Mortgage of the Colorado Industrial Company.

On July 1, 1936, the Plan of Reorganization was consummated in accordance with the foregoing order, and thereafter the Petitioner surrendered its \$44,000.00 face amount of Colorado Industrial Company First Mortgage 5% Bonds in exchange for \$17,600.00 face amount of the Income Mortgage Bonds and 880 shares of the stock of The Colorado Fuel and Iron Corporation.

At that time no shares of stock of The Colorado Fuel and Iron Corporation, other than the above-mentioned 552,660 shares of stock to be issued to the holders of Colorado Industrial Company First Mortgage 5% Bonds, were issued, so that immediately after the exchange, the holders of said Colorado Industrial Bonds were in control of The Colorado Fuel and Iron Corporation.

B. The market value of the securities received by the Petitioner did not exceed \$79.00 for each \$100.00 face value of 5% income mortgage bonds and \$27.25 for each share of the capital stock, a total of \$37,884.00.

Wherefore, Petitioner prays that the Board hear this proceeding and determine that there is no deficiency in income

tax, excess profits tax or personal holding company surtax for the year 1936.

**JAMES B. GRANT,**  
First National Bank Building,  
Denver, Colorado.  
**STEPHEN H. HART,**  
Stephen H. Hart,  
First National Bank Building,  
Denver, Colorado.  
Attorneys for the Petitioner.

[Verification omitted.]

**Exhibit A.**

Treasury Department.  
Washington.

January 28, 1939.

Cement Investors, Inc.,  
104 Boston Building,  
Denver, Colorado.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1936 discloses a deficiency of \$8,427.89, and that the determination of your excess-profits tax liability for the year mentioned discloses a deficiency of \$2,381.88, and that the determination of your surtax liability (section 351) for the year mentioned discloses a deficiency of \$6,175.26, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the atten-

tion of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner.

By JOHN R. KIRK,  
Deputy Commissioner.

Enclosures:

Statement

Form of waiver.

Statement.

IT:R:E:5:6  
EFC-90D

Cement Investors, Inc.,  
104 Boston Building,  
Denver, Colorado.

**Tax Liability for Taxable Year Ended  
December 31, 1936.**

|                      | Liability   | Assessed    | Deficiency |
|----------------------|-------------|-------------|------------|
| Income Tax           | \$40,082.76 | \$31,654.87 | \$8,427.89 |
| Excess-Profits Tax   | 4,344.87    | 1,962.99    | 2,381.88   |
| Surtax (Section 351) | 6,175.26    | None        | 6,175.26   |

In making this determination of your tax liability, careful consideration has been given to the report of examination dated July 29, 1938; to your protest dated August 25, 1938; to the statement made at the conference held on September 29, 1938; and to your letter dated January 7, 1939.

**Adjustments to Net Income.**

|   |              |
|---|--------------|
| Net income as disclosed by return             | \$738,813.48 |
| Unallowable deductions and additional income: |              |
| (a) Profit from exchange of securities        | 28,490.75    |
| (b) Excess-profits tax for 1936               | 1,962.99     |
| Net income adjusted                           | \$769,267.22 |

## Explanation of Adjustments

(a) Taxpayer held \$44,000.00 par value of Colorado Industrial Company 5 percent thirty-year Gold Bonds, which bonds were guaranteed by Colorado Fuel and Iron Company. Colorado Fuel and Iron Company, reorganized under the name of Colorado Fuel and Iron Corporation, and exchanged its own bonds and common stock on September 1, 1936 for the Colorado Industrial Company bonds. The basis of the exchange was \$400.00 par bonds and 20 shares of stock of the new company for each \$1,000.00 par old bond. Taxpayer received for 44,000 par old bonds:

44x400 par bond

17,600 par

44x 20 shares of stock

800 shares

The Bureau holds that this was a taxable exchange and that the market value of the new securities on September 19, 1936, was:

Bonds | \$85.25

Stock | 32.25

Received in exchange:

17,600 par bonds at \$85.25

\$15,004.00

800 shares of stock at \$32.25

28,380.00

Total

43,384.00

Less:

Cost of old bonds

14,893.25

Profit

\$28,490.75

(b) As your books of account and records are on a cash basis, the excess-profits tax liability for 1936 is not an allowable deduction from income.

## Computation of Tax.

## Excess-Profits Tax:

|                    |              |
|--------------------|--------------|
| Taxable net income | \$769,267.22 |
|--------------------|--------------|

## Less:

|   |              |            |
|---|--------------|------------|
| Dividends received credit   | \$608,059.94 |            |
| 10% of \$1,000,000.00 value of<br>capital stock as declared in<br>your capital stock tax return<br>for year ended June 30, 1936 | 100,000.00   | 708,059.94 |

|  |              |
|--|--------------|
| Net income subject to excess-profits tax | \$ 61,207.28 |
| 5% of declared value of capital stock    | 50,000.00    |

|         |              |
|---------|--------------|
| Balance | \$ 11,207.28 |
|---------|--------------|

## Excess-profits tax:

|                    |             |
|--------------------|-------------|
| 6% of \$50,000.00  | \$ 3,000.00 |
| 12% of \$11,207.28 | 1,344.87    |

|                          |             |
|--------------------------|-------------|
| Total excess-profits tax | \$ 4,344.87 |
|--------------------------|-------------|

|  |          |
|--|----------|
| Excess-profits tax assessed,<br>original, account No. 400714 | 1,962.99 |
|--|----------|

|            |          |
|------------|----------|
| Deficiency | 2,381.88 |
|------------|----------|

## Income tax:

## Normal tax:

|                                       |              |
|---------------------------------------|--------------|
| Net income for normal tax computation | \$769,267.22 |
|---------------------------------------|--------------|

## Less:

|   |            |            |
|---|------------|------------|
| Interest on United States<br>obligations  | \$ 715.06  |            |
| Dividends received credit, for<br>companies other than mutual<br>investment companies | 608,059.95 | 608,775.00 |

|                       |              |
|-----------------------|--------------|
| Normal tax net income | \$160,492.22 |
|-----------------------|--------------|

|                   |           |
|-------------------|-----------|
| 8% of \$ 2,000.00 | \$ 160.00 |
|-------------------|-----------|

|                     |          |
|---------------------|----------|
| 11% of \$ 13,000.00 | 1,430.00 |
|---------------------|----------|

|                     |          |
|---------------------|----------|
| 13% of \$ 25,000.00 | 3,250.00 |
|---------------------|----------|

|                     |           |
|---------------------|-----------|
| 15% of \$120,492.22 | 18,073.83 |
|---------------------|-----------|

|                  |              |
|------------------|--------------|
| Total normal tax | \$ 22,913.83 |
|------------------|--------------|



**Surtax on Undistributed profits:**

|                    |  |              |
|--------------------|--|--------------|
| Taxable net income |  | \$769,267.22 |
|--------------------|--|--------------|

|       |  |  |
|-------|--|--|
| Less: |  |  |
|-------|--|--|

|            |             |  |
|------------|-------------|--|
| Normal tax | \$22,913.83 |  |
|------------|-------------|--|

|   |        |           |
|---|--------|-----------|
| Interest on United States obligations, etc. | 715.06 | 23,628.89 |
|---|--------|-----------|

|                     |  |              |
|---------------------|--|--------------|
| Adjusted net income |  | \$745,638.33 |
|---------------------|--|--------------|

|       |  |  |
|-------|--|--|
| Less: |  |  |
|-------|--|--|

|                       |  |            |
|-----------------------|--|------------|
| Dividends paid credit |  | 578,853.00 |
|-----------------------|--|------------|

|  |  |              |
|--|--|--------------|
|  |  | \$166,785.33 |
|--|--|--------------|

|                   |  |             |
|-------------------|--|-------------|
| 7% of \$74,563.83 |  | \$ 5,219.47 |
|-------------------|--|-------------|

|                    |  |          |
|--------------------|--|----------|
| 12% of \$74,563.84 |  | 8,947.66 |
|--------------------|--|----------|

|                    |  |          |
|--------------------|--|----------|
| 17% of \$17,657.66 |  | 3,001.80 |
|--------------------|--|----------|

|  |  |              |
|--|--|--------------|
|  |  | \$ 17,168.93 |
|--|--|--------------|

|              |  |              |
|--------------|--|--------------|
| Total surtax |  | \$ 17,168.93 |
|--------------|--|--------------|

|            |  |           |
|------------|--|-----------|
| Normal tax |  | 22,913.83 |
|------------|--|-----------|

|  |  |              |
|--|--|--------------|
|  |  | \$ 40,082.76 |
|--|--|--------------|

|  |  |  |
|--|--|--|
| Total income tax (normal tax and surtax) |  |  |
|--|--|--|

|  |  |  |
|--|--|--|
| Income tax assessed (normal tax and surtax): |  |  |
|--|--|--|

|                              |  |           |
|------------------------------|--|-----------|
| Original, account No. 400714 |  | 31,654.87 |
|------------------------------|--|-----------|

|  |  |             |
|--|--|-------------|
|  |  | \$ 8,427.89 |
|--|--|-------------|

|            |  |  |
|------------|--|--|
| Deficiency |  |  |
|------------|--|--|

Computation of Surtax.  
Section 351.

Adjusted Net Income.

|            |  |              |
|------------|--|--------------|
| Net Income |  | \$769,267.22 |
|------------|--|--------------|

|       |  |  |
|-------|--|--|
| Less: |  |  |
|-------|--|--|

|                    |  |          |
|--------------------|--|----------|
| Federal income tax |  | 1,428.36 |
|--------------------|--|----------|

|  |  |              |
|--|--|--------------|
|  |  | \$767,838.86 |
|--|--|--------------|

|                     |  |  |
|---------------------|--|--|
| Adjusted net income |  |  |
|---------------------|--|--|

Undistributed Adjusted Net Income.

|       |  |  |
|-------|--|--|
| Less: |  |  |
|-------|--|--|

|                     |              |  |
|---------------------|--------------|--|
| 20% of \$767,838.86 | \$153,567.77 |  |
|---------------------|--------------|--|

|                            |            |            |
|----------------------------|------------|------------|
| Dividends paid during year | 578,853.00 | 732,420.77 |
|----------------------------|------------|------------|

|  |  |              |
|--|--|--------------|
|  |  | \$ 35,418.09 |
|--|--|--------------|

|                                   |  |  |
|-----------------------------------|--|--|
| Undistributed adjusted net income |  |  |
|-----------------------------------|--|--|



## Computation of Tax.

## Section 351.

|                              |              |
|------------------------------|--------------|
| Undistributed net income     | \$ 35,418.09 |
| Surtax at 8% on \$ 2,000.00  | 160.00       |
| Surtax at 18% on \$33,418.09 | 6,015.26     |

|                |             |
|----------------|-------------|
| Total surtax   | \$ 6,175.26 |
| Total assessed | None.       |

|  |             |
|--|-------------|
| Deficiency of surtax under Section 351 of<br>the Revenue Act of 1936 | \$ 6,175.26 |
|--|-------------|

Filed Sept. 21, 1939. U. S. Board of Tax Appeals.

## Answer to Amended Petition.

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits the allegations contained in paragraph 3 of the amended petition.

4. A. Denies that respondent erred as alleged in subparagraph A of paragraph 4 of the petition.

B. Denies that respondent erred as alleged in subparagraph B of paragraph 4 of the petition.

5. A. Denies the matter set forth in subparagraph A of paragraph 5 of the petition, except it is admitted that petitioner surrendered \$44,000.00 face amount of Colorado Industrial Company First Mortgage 5% Bonds in exchange for \$17,600.00 face amount of the Income Mortgage Bonds and 880 shares of the stock of the Colorado Fuel and Iron Corporation.

~~B. Admits the matter set forth in subparagraph B of paragraph 5 of the petition.~~

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

Signed: J. P. WENCHEL, ARS

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

R. P. HERTZOG, Division Counsel.

ANGUS ROY SHANNON, JR., Special Attorney,  
Bureau of Internal Revenue.

Filed October 25, 1939. United States Board of Tax Appeals.

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Memorandum Findings of Fact and Opinion.

Stephen H. Hart, Esq., and James B. Grant, Esq., for the petitioner.

Angus R. Shannon, Jr., Esq., and Carroll Walker, Esq., for the respondent.

Harron: The Commissioner determined deficiencies in income, excess profits, and surtax under section 351, for the year 1936 in the respective amounts of \$8,427.89; \$2,381.88; and \$6,175.26, respectively, or a total of \$16,985.03. The deficiency is contested only in part since petitioner concedes that other adjustments made by respondent are correct. The only question involved is whether the exchange of bonds of the Colorado Industrial Company for stock and bonds of the Colorado Fuel and Iron Corporation, a new corporation, pursuant to a plan of reorganization under section 77 B of the Bankruptcy Act constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936.

### Findings of Fact.

The petitioner is a Delaware corporation with its principal office and place of business in Denver, Colorado. Prior to September 2, 1936, petitioner owned \$44,000 face amount of bonds of the Colorado Industrial Company.

The Colorado Industrial Company, hereafter called Industrial, was a Colorado corporation. It was wholly owned by the Colorado Fuel and Iron Company, hereafter called Fuel and Iron, a Colorado corporation, which owned all of its capital stock consisting of 200 shares. Fuel and Iron had been engaged in the manufacture and sale of steel and iron products. Industrial was not engaged in any active business and had no assets of any substantial value, having transferred substantially all of its assets to Fuel and Iron in the year 1913.

Under date of August 1, 1904, Industrial issued bonds generally known as First Mortgage 5% Bonds which were secured by a mortgage or deed of trust of Industrial. The bonds matured August 1, 1934. These bonds of Industrial were unconditionally guaranteed both as to principal and interest by Fuel and Iron. These bonds were Industrial's only securities outstanding in the hands of the public. The total face amount of these bonds held by the public on August 1, 1934, was \$27,633,000. Industrial defaulted in the payment of interest on these bonds due on August 1, 1933, and on subsequent interest installments; and Fuel and Iron defaulted under its guarantee of interest payments.

Fuel and Iron had outstanding in the hands of the public in 1933 \$4,500,000 face amount of bonds known as General Mortgage 5% Bonds. On August 1, 1933, Fuel and Iron defaulted in the payment of the semi-annual interest due on its bonds. On the same day a receiver for the properties of Fuel and Iron was appointed by the United States District Courts of Colorado and Wyoming. Following the receivership of Fuel and Iron, committees were constituted for the purpose of representing bondholders and stockholders of Fuel and Iron and for the bondholders of Industrial. There was outstanding stock of Fuel and Iron consisting of 20,000 shares of 8% cumulative preferred stock, \$100 par value per share, and 340,505 shares of common stock, no par value. The preferred stock was entitled to cumulative dividends at the rate of 8 per cent

per annum but ranked equally with the common stock in the distribution of assets. Dividends had not been paid on the preferred stock since November 25, 1931.

On August 1, 1934, when Industrial and Fuel and Iron defaulted on Industrial's First Mortgage 5% Bonds, each company filed petitions in the United States District Court for Colorado, instituting proceedings for reorganization under section 77 B of the Federal Bankruptcy Act. The previously appointed receiver of Fuel and Iron was appointed trustee of the estates of both companies in the reorganization proceedings.

A plan of reorganization of Fuel and Iron and Industrial, dated March 1, 1935, was drafted by the reorganization managers at the request of the separate committees for the bondholders of the two companies, and this proposed plan, pursuant to Section 77 B of the Bankruptcy Act was filed with the District Court. On May 1, 1935, an order of the District Court was entered finding and decreeing that the plan complied with the provisions of subdivision (b) of Section 77 B of the Bankruptcy Act, and that it had been duly prepared in accordance with subdivision (d) of Section 77 B. Among other things the court directed the trustee to mail copy of the plan and forms of acceptance of the plan to holders of bonds and stocks of Fuel and Iron, and of bonds of Industrial; which was done. Acceptances of the plan were filed by the holders of Industrial bonds and of the preferred and common stock of Fuel and Iron as follows:

|                        |                         |       |               |
|------------------------|-------------------------|-------|---------------|
| Industrial bonds       | \$27,633.00 outstanding | 75.7% | approved plan |
| Fuel & Iron Pfd. stock | 20,000 shs.             | 61.3% | " "           |
| " " " common"          | 240,505 shs.            | 53.2% | " "           |

On April 25, 1936, the District Court entered its order confirming the plan. By this order the court approved the certificate of incorporation of a new corporation, the Colorado Fuel and Iron Corporation, hereafter referred to as the New Company. That certificate had been filed in the office of the Secretary of State of Colorado on April 16, 1936. The authorized capital of the New Company was 1,000,000 shares of common stock without par value. On June 20, 1936, the District Court entered its order approving forms of documents and directing the transfer of all of the assets of Fuel and Iron

and Industrial to the New Company, and directing other things; which was done by executing proper conveyances.

The purpose of the reorganization plan was as follows:

(1) To strengthen the capital structure of the enterprise, through drastic reduction of fixed charges and the provision of a financing medium for future financial requirements.

(2) To give full recognition to the paramount rights of bondholders.

(3) To enable the stockholders to regain an interest in the enterprise upon a basis which takes account of the present junior rank of the stockholders and of the relative rights and priorities of the two classes of stock.

The effect of the plan was to give to the holders of Industrial's bonds the entire ownership and control of the New Company, subject to \$4,500,000 bonds of Fuel and Iron which were not to be disturbed in the reorganization. Since the Industrial bonds were in default on both principal and interest, the only stock of the New Company to be issued was 552,660 shares which were to be issued to the holders of Industrial bonds in exchange.

Under the approved plan of reorganization and orders of the District Court the following was done:

(1) As of July 1, 1936, the assets of Fuel and Iron and of Industrial were transferred by proper conveyances to the New Company.

(2) The New Company issued 552,660 shares of its stock to be distributed to holders of bonds of Industrial; reserved 315,379 shares to be applied against warrants; and reserved the remaining 131,961 shares for corporate purposes. It issued \$11,053,200 principal amount of 5% Income Mortgage Bonds due April 1, 1970 to be distributed to Industrial's bondholders. It assumed payment of \$4,500,000 general bonds of Fuel and Iron, which bonds were not affected by the reorganization plan. It issued warrants for the purchase, on or before April 1, 1950, of 315,379 shares of its stock at \$35 a share to be distributed to the preferred and common stockholders of Fuel and Iron. The warrant agreement entered into between the New Company and the Chase National Bank of New York,



warrant agent, under date of July 1, 1936, provided that the holders of warrants should not have the right to vote or to receive notice as stockholders, and should have no rights whatsoever as stockholders of the New Company. The option price under the warrants was considerably higher than the opening market price for shares of the New Company.

(3) The reorganization managers gave notice to the holders of Industrial's bonds and Fuel and Iron's stock that the new securities would be available for distribution on September 1, 1936.

(4) At or about that date the holders of Industrial bonds surrendered their bonds for cancellation in exchange for Income Mortgage Bonds and stock of the New Company upon the basis of (a) \$400 principal amount of Income Bonds and (b) 20 shares of common stock for each \$1,000 principal amount of Industrial bonds. Immediately after the consummation of the plan all of the issued stock, 552,660 shares of common stock, of the New Company, belonged to the former holders of bonds of Industrial. No stock was issued to parties other than such bondholders until October 23, 1936, when 37 shares were issued upon the exercise of warrants, and by June 30, 1938 only 465 shares had been issued upon the exercise of warrants.

(5) At or about the same date warrants to purchase common stock of the New Company were distributed to preferred and common stockholders of Fuel and Iron as follows: For each share of preferred stock of Fuel and Iron, one warrant to purchase, on or before February 1, 1950, three shares of common stock of the New Company at \$35 per share. For each share of common stock of Fuel and Iron there was given one warrant to purchase  $\frac{3}{4}$  of one share of common stock of the New Company at \$35 a share.

(6) The capital stock of Industrial was cancelled. Also, \$7,741,000 principal amount of Industrial's bonds owned by Fuel and Iron were cancelled. The first mortgage of Industrial which had secured its bonds was satisfied and discharged. These bonds had been held in Fuel and Iron's treasury but they had not been set up as an asset or liability on the books. The amount of Industrial's bonds that had been carried on Fuel and Iron's books as a liability was \$27,633,000.



On September 2, 1936, petitioner surrendered its \$44,000 principal amount of Industrial bonds and received in exchange \$17,600 principal amount of Income Mortgage Bonds and 880 shares of stock of the New Company.

On the date of exchange the fair market value of the securities of the New Company received in exchange by petitioner was \$79 for each \$100 face amount of Income Mortgage Bonds and \$27.25 for each share of stock. The adjusted basis of the Industrial bonds in the hands of petitioner was \$14,893.25.

### Opinion.

The facts in this case are identical with the facts in *James Q. Newton Trust, 42 B. T. A. ....*, promulgated August 6, 1940. Petitioner in this case, however, limited its contentions to the claim that the reorganization under section 77 B of the Bankruptcy Act constituted a reorganization within (C) of section 112 (g) (1) of the Revenue Act of 1936. Accordingly, in this case the opinion is limited to consideration of that contention.

We are of the opinion that the reorganization under section 77 B of the Bankruptcy Act constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936, within (C) of section 112 (g) (1)<sup>1</sup>. In our opinion the situation here is very much like the situation in *Commissioner v. Kitselman, 89 Fed. 458; certiorari denied, 302 U. S. 709*, and the question is controlled by that case. In the *Kitselman* case, after the various steps had been taken the bondholders of the old company were in control of the new company and this somewhat unusual situation presented difficulty because section 112 (g) (1) (C) predicates a reorganization on the requirement that the transferor or the stockholders of the transferor be in control of the new company. The court reasoned that where the old company is

### SEC. 112. RECOGNITION OF GAIN OR LOSS.

(g) Definition of Reorganization.—As used in this section and section 113—

(1) The term "reorganization" means (A) a statutory merger or consolidation, \* \* \* or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form or place of organization, however effected.

insolvent and its assets are transferred to a new company formed by the *bondholders'* representatives, the bondholders occupy a status somewhat akin to that of preferred stockholders, for all practical purposes. The court stated the following:

Bondholders ordinarily are viewed as creditors, but when the assets of the corporation are less than its obligations, the bondholders are in actuality and for all practical purposes pretty much the corporation. \* \* \*

It is clear that the bondholders were the moving spirit and were treated as the owners in fact, and it follows that they must be viewed as a class of "stockholders" somewhat akin to preferred stockholders with cumulative dividend rights. \* \* \* Where the assets of the corporation fall far below the amount required to pay the bondholders in full, the bondholders in bankruptcy reorganization supersede the stockholders. They acquire the stockholders' rights to manage the corporate affairs. There is a difference between the position of stockholders in a case like the present one and stockholders of a corporation in bankruptcy proceeding under section 77 B (U. S. C. A. § 207) to a reorganization, but the analogies are sufficient to justify a study of the decisions in the latter field.

The above reference in the quotation to a reorganization under section 77B of the Bankruptcy Act is significant here. In our opinion the situation in this case is as favorable, if not more favorable, to petitioner's contention than was the situation in the Kitselman case because here there was a reorganization under section 77 B of the Bankruptcy Act.

As in the Kitselman case, the difficulty is that of determining whether the holders of the Industrial bonds were the "transferor or its stockholders" within that clause in (C) of section 112 (g) (1). The situation is somewhat more complex here because there were two transferors, Industrial and Fuel and Iron, albeit, they were subsidiary and parent corporations, and the holders of the Industrial bonds were creditors of both companies, Fuel and Iron having acquired substantially all the assets, securing the bonds under a first mortgage, and having unconditionally guaranteed the interest and principal of the

bonds of Industrial. However, this complexity is not important, in our opinion. Neither the bondholders nor the stockholders of either of the old companies received any profit from the reorganization. The old companies transferred all their assets to the New Company and immediately thereafter the old companies, through the bondholders, were in control of the corporation to which the assets were transferred. The holders of Industrial bonds were creditors having claims aggregating \$27,633,000 for principal due, and \$2,763,300 for interest due. They were the creditors with prior claims, secured by a first mortgage on assets in the hands of Fuel and Iron, and they were treated as the owners in fact of the assets transferred to the New Company. It must follow here as in the Kitselman case, that the holders of the Industrial bonds be viewed as a class of "stockholders." So viewed, they come within (C) of section 112 (g) (1).

The following is pointed out in support of the above conclusion. Industrial and Fuel and Iron had been placed in receivership and had petitioned for a reorganization under section 77 B of the Bankruptcy Act. The stockholders of both of the companies had lost their equity. This was recognized by the plan of reorganization under which the entire ownership of the New Company was turned over to the holders of Industrial bonds, and the stockholders were given, merely, warrants entitling them to purchase stock in the New Company at a price considerably above the then market value. The treatment accorded various security holders of the old companies is described in the plan of reorganization as follows:

Under the Plan, the Industrial Bondholders are to receive for each \$1,000 principal amount of Bonds (together with the unpaid interest thereon which amounted to 10% to February 1, 1935): (a) \$400 principal amount of new 5% Income Mortgage Bonds and (b) 20 shares of new Common Stock. The Industrial Bondholders are to receive all of the new Income Mortgage Bonds and all of the new Common Stock of the New Company to be presently issued in the reorganization.

The entire issue of Industrial Bonds outstanding in the aggregate principal amount of \$27,633,000 is in default. Interest on the Industrial Bonds accrued and unpaid to

February 1, 1935 amounts to \$2,763,300. Accordingly, in the first instance, the Plan gives to the holders of the Industrial Bonds the entire ownership and control of the New Company, subject to \$4,500,000 of Fuel Bonds which are undisturbed in the reorganization.

The Plan, however, does not in its effect on stockholders operate as a strict foreclosure, since the stockholders are to receive Warrants entitling them at their option to purchase, at any time until February 1, 1950, a stock equity in the New Company at \$35 per share. The price at which stockholders, under the terms of such Warrants, may regain an equity position in the enterprise, takes into consideration the basis upon which the Industrial Bondholders are to receive shares of new Common Stock in exchange for that part of their debt not covered by new Income Mortgage bonds. [Emphasis supplied.]

The assets of the old companies were transferred to the New Company, and immediately thereafter the bondholders were in control of the New Company by virtue of the immediate transfer of 552,660 shares of stock of the New Company to the reorganization managers, who were the agents of the bondholders. The holders of warrants to purchase new stock in the New Company had no control. Control relates to, issued not to authorized stock. *Louangel Holding Corporation v. Anderson*, 9 Fed. Supp. 550; *C. T. Investment Co. v. Commissioner*, 88 Fed. (2d) 582. Clearly there was an exchange of securities in one corporation a party to a reorganization, in pursuance of a plan to the reorganization, solely for securities in another corporation a party to the reorganization. [Section 112 (b) (3).] All three corporations were parties to the reorganization. [Section 112 (g) (2).] The bondholders of Industrial retained a substantial stake or proprietary interest in the enterprise. There was a continuity of interest of the transferors in the transferee, evidenced by stocks and bonds of the New Company. The holders of Industrial bonds acquired the stockholders' rights to manage the corporate affairs.

With respect to the argument of respondent that the opinion in the *LeTulle* case indicates that the decision in the *Kitselman* case is wrong, and that *Helvering v. Tyng*, 308 U. S. 527, also



points that way, we believe the argument without merit. The fact that the bondholders herein retained a proprietary interest in the enterprise is a material difference between the factual situation in this case and the factual situation in either the LeTulle case or the Tyng case. Such cases are therefore clearly distinguishable and not applicable here. In the LeTulle case, when a stockholder of the transferor received bonds and cash of the transferee in exchange for his stocks, there was no continuity of interest. In the Tyng case, where the stockholders of the transferors received cash and long term indebtedness of the transferee in exchange for their stock, there was no continuity of interest. In both the LeTulle case and the Tyng case stockholders of the transferor became mere creditors of the transferee, whereas in this case creditors (the Industrial bondholders) became stockholders of the transferee and after the transfer, were in control of the corporation to which the assets were transferred. Also, we believe that E. P. Raymond, 37 B. T. A. 423, cited by respondent, is not applicable here. The point in this case is that the bondholders received all the presently issued stock of the New Company, thereby gaining control thereof.

It is held that the reorganization under section 77 B of the Bankruptcy Act was executed so as to constitute a reorganization as defined in section 112 (g) (1) (C), and the gain or loss resulting therefrom, is not recognizable under section 112 (b) (3). See also, Commissioner v. Newberry Lumber & Chemical Co., 94 Fed. (2d) 447; Marlborough House, Inc., 40 B. T. A. 881; Edith M. Greenwood, 41 B. T. A. 664; Alabama Asphaltic Limestone Co., 41 B. T. A. 324.

In view of the foregoing it is not necessary to consider whether or not the transactions come within section 112 (b) (5).

Decision will be entered under Rule 50.

Enter:

Entered Aug. 8, 1940.

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**Decision.**

Pursuant to Memorandum Findings of Fact and Opinion of the Board entered on August 8, 1940, the petitioner herein on September 4, 1940, having filed a recomputation of tax, and the respondent having agreed thereto, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of \$486.43 and no deficiency in excess profits tax and a deficiency in surtax of \$2,072.59 for the taxable year 1936.

(s) MARION J. HARRON,  
Member.

(Seal)

Enter:

Entered September 6, 1940.

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**Petition for Review and Assignments of Error.**

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr. Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

**I.**

**Jurisdiction.**

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States; that the respondent on review, Cement Investors, Inc. (hereinafter referred to as the taxpayer), is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business at 104 Boston Building, Denver, Colorado. The taxpayer filed its Federal corporation income and excess-profits tax return (Form 1120) and its return of personal holding company (Form 1120H), both for the taxable year 1936, with the Collector of Internal Revenue for the District of Colorado, whose office is located in the City of Denver, Colorado, and within the judicial circuit of the United States Circuit Court of Appeals for the Tenth Circuit.



The Commissioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

## II.

### Prior Proceedings.

On January 28, 1939, the Commissioner determined a deficiency in Federal income tax liability against the taxpayer in the amount of \$8,427.89, a deficiency in excess-profits tax liability in the amount of \$2,881.88, and a deficiency in personal holding company surtax liability in the amount of \$6,175.26, all for the year 1936, and sent to the taxpayer, by registered mail, a notice of said deficiencies in accordance with the provisions of existing internal revenue laws. Thereafter and on February 24, 1939, the taxpayer filed an appeal from said determination of the Commissioner with the United States Board of Tax Appeals.

The case was duly tried to the United States Board of Tax Appeals and on August 8, 1940, the Board entered its memorandum findings of fact and opinion, pursuant to which opinion decision was entered on September 6, 1940, wherein and whereby it was ordered and decided that there is a deficiency in income tax of \$486.43 and no deficiency in excess profits tax and a deficiency in surtax of \$2,072.59 for the taxable year 1936.

## III.

### Nature of Controversy.

Prior to September 2, 1936, the taxpayer was the owner of \$44,000 face amount of first mortgage 5 per cent bonds of the Colorado Industrial Company, a Colorado corporation (hereinafter referred to as Industrial), which bonds were due on August 1, 1934. The capital stock of Industrial was wholly owned by the Colorado Fuel & Iron Company (hereinafter called Fuel & Iron) and its bonds were unconditionally guaranteed as to principal and interest by the latter company. Industrial's bonds of the face amount of \$27,533,000 were held by the public on August 1, 1934 and \$7,741,000 face amount thereof was held by Fuel & Iron. Industrial defaulted in the payment of interest on its bonds on August 1, 1933 and on subsequent interest installments, and Fuel & Iron defaulted under its guarantee of interest payments.

In 1933 Fuel & Iron had \$4,500,000 face amount of general mortgage 5 per cent bonds outstanding in the hands of the public. It defaulted in the payment of the semi-annual interest due on those bonds on August 1, 1933. On the latter date a receiver was appointed for Fuel & Iron's properties by the United States District Courts of Colorado and Wyoming. When the two corporations later defaulted on Industrial's first mortgage 5 per cent bonds, on August 1, 1934, each company filed a petition with the United States District Court of Colorado seeking a reorganization under Section 77B of the Federal Bankruptcy Act, whereupon the receiver previously appointed for Fuel & Iron was appointed trustee of the properties of both companies. On April 25, 1936, the District Court confirmed a plan of reorganization previously filed with the Court and accepted by a majority of Industrial's bondholders and Fuel & Iron's common and preferred stockholders. The Court approved the certificate of incorporation of a new corporation, the Colorado Fuel & Iron Corporation, and on June 20, 1936, entered its order directing, among other things, the transfer of all of the assets of Fuel & Iron and Industrial to the new corporation which was done, as of July 1, 1936 by the execution of proper conveyances.

Under the plan of reorganization as approved by the Court, the only stock of the new company to be issued was 552,660 shares which were to be issued to the holders of Industrial's bonds in exchange. Pursuant to the plan the new company issued 552,660 shares of its stock to be distributed to the holders of Industrial's bonds, reserved 315,379 shares to be applied against warrants which it issued, in accordance with the plan, to the preferred and common stockholders of Fuel & Iron, and reserved the remaining 131,961 shares for corporate purposes. The warrants were issued; under the plan, to enable Fuel & Iron's stockholders to regain an interest in the enterprise, if they so desired, at \$35 a share on or before April 1, 1950, but the warrant agreement filed with the Chase National Bank of New York, warrant agent, provided that the holders of warrants should have no rights whatsoever as stockholders of the new company. During the year 1936, only 37 shares of stock of the new company were issued by reason of the exercise of warrants. The new company also issued, pursuant to the plan, \$11,053,200 principal amount of five percent

income mortgage bonds due April 1, 1970, to be distributed to Industrial's bondholders, and assumed payment of the \$4,500,000 face amount of Fuel & Iron's general bonds. Industrial's bondholders thereupon gained the entire ownership and control of the new company subject to the \$4,500,000 bonds of Fuel & Iron which were not disturbed in the reorganization.

On September 2, 1936, the taxpayer surrendered its industrial bonds in the face amount of \$44,000 and received therefor \$17,600 face amount of income mortgage bonds and 880 shares of stock of the new company. In its Federal income and excess profits tax return and its personal holding company return the taxpayer reported no gain or loss on the exchange. In his notice of deficiency the Commissioner treated the exchange as a taxable one. The taxpayer contended that the Section 77B reorganization of Fuel & Iron and Industrial constituted a nontaxable reorganization under Section 112 of the Revenue Act of 1936. The Board of Tax Appeals agreed with the taxpayer's contention and redetermined its tax liability accordingly.

#### IV.

##### Assignments of Error.

The Commissioner avers that in the record and proceedings before the United States Board of Tax Appeals and in the opinion and final decision rendered and entered by the United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceedings, opinion, and final decision so rendered and entered by the United States Board of Tax Appeals:

The United States Board of Tax Appeals erred—

1. In ordering and deciding that there is a deficiency in income tax for the year, 1936 in the amount of only \$486.43, a deficiency in surtax in the amount of only \$2,072.59, and no deficiency in excess profits tax.

2. In failing to sustain the deficiencies determined by the Commissioner, less a proper reduction of said deficiencies to reflect the adjustments agreed upon by the parties at the hearing before the United States Board of Tax Appeals.

3. In holding and deciding that the reorganization under Section 77B of the Bankruptcy Act constituted a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

4. In failing to hold and decide that the reorganization under Section 77B of the Bankruptcy Act did not constitute a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

5. In holding that there was a continuity of interest of the transferors in the transferee within the scope and meaning of Section 112 (g) (1) (C) of the Revenue Act of 1936.

6. In holding and deciding that the gain resulting to the taxpayer from the exchange was not recognizable under Section 112 (b) (3).

7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Tenth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) SAMUEL O. CLARK, JR.,  
Assistant Attorney General.

(Signed) J. P. WENCHEL,  
RLW

J. P. Wenchel,  
Chief Counsel,  
Bureau of Internal Revenue.

Of Counsel:

CHARLES E. LOWERY,  
Special Attorney,  
Bureau of Internal Revenue.

Filed Nov. 26, 1940.

**Notice of Filing Petition for Review.**

To: Stephen H. Hart, Esq., James B. Grant, Esq., First National Bank Building, Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of November, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

(s) B. D. GAMBLE,  
Clerk, United States Board  
of Tax Appeals.

Service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 28th day of November, 1940.

(s) STEPHEN H. HART,  
Counsel for Respondent  
on Review.

Filed Dec. 2, 1940.

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**Notice of Filing Petition for Review.**

To: Cement Investors, Inc., 104 Boston Building, Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of November, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

(Signed) J. P. WENCHEL,  
J. P. Wenchel, RLW  
Chief Counsel, Bureau  
of Internal Revenue.



Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 2nd day of December, 1940.

CEMENT INVESTORS, INC.,

By (s) C. K. BOETTCHER, Pres.

Respondent on Review.

Filed Dec. 5, 1940.

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Statement of Points.

Comes now the petitioner on review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to-wit:

The United States Board of Tax Appeals erred—

1. In ordering and deciding that there is a deficiency in income tax for the year 1936 in the amount of only \$486.43, a deficiency in surtax in the amount of only \$2,072.59, and no deficiency in excess profits tax.

2. In failing to sustain the deficiencies determined by the Commissioner, less a proper reduction of said deficiencies to reflect the adjustments agreed upon by the parties at the hearing before the United States Board of Tax Appeals.

3. In holding and deciding that the reorganization under Section 77B of the Bankruptcy Act constituted a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

4. In failing to hold and decide that the reorganization under Section 77 B of the Bankruptcy Act did not constitute a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

5. In holding that there was a continuity of interest of the transferors in the transferee within the scope and meaning of Section 112 (g) (1) (C) of the Revenue Act of 1936.

6. In holding and deciding that the gain resulting to the

taxpayer from the exchange was not recognizable under Section 112 (b) (3).

7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

Signed: J. P. WENCHEL,

CAR

J. P. Wenchel,

Chief Counsel, Bureau  
of Internal Revenue.

**Statement of Service:**

A copy of this Statement of Points was mailed to attorneys for respondent on review this date, January 8, 1941.

(s) J. P. WENCHEL,  
J. P. Wenchel, Chief Counsel,  
Bureau of Internal Revenue.

Service of a copy of the within statement of points is hereby admitted this 13th day of January, 1941.

(s) STEPHEN H. HART,  
Attorney for Respondent  
on Review

Filed Jan. 8, 1941.

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**Designation of Portions of Record to Be Contained  
in Record on Review.**

**To the Clerk of the United States Board of Tax Appeals:**

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Tenth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
  - (a) Amended petition, including annexed copy of deficiency letter and statement attached thereto.
  - (b) Answer to amended petition.

3. Memorandum findings of fact and opinion entered August 8, 1940.

4. Decision entered September 6, 1940.

5. Petition for review, together with proof of service of notices of filing petition for review and of service of a copy of petition for review.

6. Statement of Points.

7. This designation of portions of record to be contained in record on review.

Signed J. P. WENCHEL,  
CAR

J. P. Wenchel,  
Chief Counsel, Bureau  
of Internal Revenue.

**Statement of Service:**

A copy of this designation of portions of record to be contained in record on review was mailed to attorneys for respondent on review this date, January 8, 1941.

(s) J. P. WENCHEL,  
J. P. Wenchel, Chief Counsel,  
Bureau of Internal Revenue.

Filed Jan. 8, 1941.

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**Stipulation of Facts.**

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective counsel, that the following is a true statement of the facts herein involved:

1. Petitioner now is, and during all the times herein mentioned has been, a corporation duly organized and existing under the laws of the State of Delaware, with its principal office and place of business at 104 Boston Building, Denver, Colorado. The corporation and personal holding company income tax returns herein involved (copies of which, marked, respectively, Exhibits "A" and "B", are attached hereto and by this reference made a part hereof) were filed with the Collector of Internal Revenue for the District of Colorado, at Den-

ver, Colorado. During all the times mentioned herein petitioner has kept its books and filed its returns on a cash receipts and disbursement basis.

2. The notice of deficiency, (copy of which, marked "Exhibit C", is attached hereto) was mailed to petitioner on January 28, 1939.

3. The tax in controversy consists of income tax, excess profits tax and personal holding company surtax for the calendar year 1936. The respondent, by said notice of deficiency, has determined a deficiency of \$16,985.03, consisting of \$8,427.89 income tax, \$2,381.88 excess profits tax and \$6,175.26 personal holding company surtax. Petitioner admits a deficiency of \$486.43 income tax and \$2,072.59 personal holding company surtax, a total admitted deficiency of \$2,559.02. The amount in controversy, therefore, is a total tax of \$14,426.01, consisting of \$7,941.46 income tax, \$2,381.88 excess profits tax and \$4,102.67 personal holding company surtax.

4. On March 12, 1935 there was filed in the District Court of the United States, for the District of Colorado, In the Matter of The Colorado Fuel and Iron Company and Another, Colorado Corporations, Debtors, Consolidated Cause No. 8081, a Plan of Reorganization (a copy of which, marked "Exhibit D" is attached hereto and by reference made a part hereof). At that time The Colorado Fuel and Iron Company had outstanding its own General Mortgage Five Per Cent. Bonds, preferred stock and common stock, and it was also the guarantor on the First Mortgage Five Per Cent. Bonds of The Colorado Industrial Company, a wholly owned subsidiary. These bonds of The Colorado Industrial Company were its only securities outstanding in the hands of the public. Both of these corporations were before the Court on their petitions for reorganization under Section 77-B of the Bankruptcy Act, filed August 1, 1934.

5. On March 12, 1935 the Court entered its order finding that the Plan had been proposed in accordance with the provisions of Section 77-B and ordering that the holders of Colorado Industrial Company Bonds and the preferred and common stockholders of The Colorado

Fuel and Iron Company be notified of the Plan and given the opportunity to express their acceptance thereof. Copies of said Order and of the form of acceptance for bonds in registered and in bearer form, marked Exhibits "E", and "F" and "G", are attached hereto and by this reference made a part hereof.

6. On April 25, 1936 the Court entered its Findings of Fact and Conclusions of Law and its Order confirming the Plan of Reorganization and finding that it was fair and equitable and did not discriminate unfairly in favor of any class of creditors or stockholders. A copy of these Findings, Conclusions and Order, marked Exhibit "H", is attached hereto and by this reference made a part hereof. The Plan of Reorganization, as so approved, provided that a new company should be organized with an authorized capital of 1,000,000 shares of stock and \$11,053,200.00 Five Per Cent. Income Mortgage Bonds. The new company was to assume the payment of the General Mortgage Five Per Cent. Bonds of The Colorado Fuel and Iron Company. It was to issue \$11,053,200.00 of its Income Mortgage Bonds and 552,660 shares of its stock in exchange for the bonds of The Colorado Industrial Company guaranteed by The Colorado Fuel and Iron Company, in the ratio of \$400.00 face value of new bonds and 20 shares of stock for each \$1,000.00 face amount of Colorado Industrial Company bonds. Since the Industrial Company bonds were then in default on both principal and interest, such 552,660 shares issued to the holders of Industrial Bonds were the only shares of the new company to be presently issued. The new company was to give to the preferred and common stockholders of the old Colorado Fuel and Iron Company merely warrants to purchase certain specified amounts of stock of the new company at \$35.00 per share on or before February 1, 1950, which option price was considerably higher than the opening market price for shares of the new company. Three Hundred fifteen thousand, three hundred seventy-nine shares of stock of the new company were reserved for this purpose. Thus, the Plan provided that 1,000,000 shares of the new Company should be authorized. Of this number, 552,660 shares were to



be issued to the holders of Industrial Bonds; 315,379 shares were to be reserved to apply against warrants, when, as and if the option were exercised; and the remaining 131,961 shares were reserved for corporate purposes.

7. In pursuance of the Plan of Reorganization and the Orders of April 25, 1936, the new company, The Colorado Fuel and Iron Corporation, was organized under the laws of the State of Colorado, and on June 20, 1936 the Court entered its Order approving the form of documents and directing the transfer of assets to, and the issuance of securities and assumption of liabilities by, the new company. A copy of this Order, marked "Exhibit I", is attached hereto and by this reference made a part hereof. It provided that on July 1, 1936, The Colorado Fuel and Iron Company, The Colorado Industrial Company, Arthur Roeder, Trustee of the assets of both, and The New York Trust Company, as Trustee under the Colorado Industrial Company mortgage, should convey to The Colorado Fuel and Iron Corporation all their right, title and interest in all of the assets of The Colorado Fuel and Iron Company and the Colorado Industrial Company. Simultaneously, or promptly thereafter, The Colorado Fuel and Iron Corporation was directed to deliver to, or on the order of, the Reorganization Managers \$11,053,200.00 of its Income Bonds, 552,660 shares of its stock and warrants representing the right to purchase 315,379 shares of its stock. Simultaneously, or promptly thereafter, The New York Trust Company, as Trustee of this first mortgage of the Industrial Company, was directed to execute a satisfaction and discharge of the First Mortgage of the Industrial Company. As soon as reasonably practicable, the Reorganization Managers were directed to distribute to the holders of Industrial Bonds the new Income Bonds and all of the stock of the new company to be issued, and to distribute to the preferred and common stockholders of the old company warrants to purchase stock in accordance with the terms of the warrant agreement. A copy of said warrant agreement, marked "Exhibit J", is attached hereto and made a part hereof.

8. The Order further provided as follows (Ar. Two, Par. F, p. 7):

"The provisions of this Order directing the transfer and delivery of the properties and assets of the Debtors to the New Company, the assumption by the New Company of certain obligations of the Debtors and of the Trustee as hereinabove and in Article Three hereof provided, and the issue by the New Company to or on the order of, and the distribution by, the Reorganization Managers of the New Securities, shall be a single and entire order and direction, notwithstanding the provisions hereof permitting the transfer of said properties and assets forthwith and without awaiting the assumption by the New Company of said liabilities or the issue, delivery and distribution of the New Securities."

Similarly it directed that any dividends or interest paid with respect to any of the new securities during the period when such new securities were held by the Reorganization Managers or distributing agents should be held by them and paid to the holders of the Industrial Bonds as soon as the physical exchange was effected.

9. Pursuant to Article Five of said Order of June 20th, the Reorganization Managers gave notice to the holders of Industrial Bonds that the new securities would be available for distribution on September 1, 1936. A copy of this notice, marked "Exhibit K", is attached hereto and by this reference made a part hereof. Thereafter, on September 2, 1936, the petitioner surrendered its \$44,000.00 face amount of Colorado Industrial Company First Mortgage Five Per Cent. Bonds in exchange for \$17,600.00 face amount of the Income Mortgage Bonds and 880 shares of the stock of The Colorado Fuel and Iron Corporation. At the same time and in due course the other holders of Industrial Bonds surrendered their certificates for cancellation in exchange for Income Bonds and shares of stock in the new company upon the same basis as provided in the Plan.

10. Pursuant to the Order of June 20, 1936, the properties of The Colorado Fuel and Iron Company and the Colorado Industrial Company, and all the right,

title and interest of the Trustees under the Industrial Company Mortgage were transferred to the new company as of July 1, 1936, as is recited in the final report of the Reorganization Trustee, dated September 12, 1938 and filed September 13, 1938. A copy of said conveyance, marked "Exhibit L", and an extract from said report, marked "Exhibit M", are attached hereto and by this reference made a part hereof. By June 30, 1938, \$11,029,200.00 face value Income Bonds and 551,460 shares of stock in the new company had been distributed in exchange for Industrial Bonds pursuant to the Plan and the Order of April 25, 1936, leaving only \$24,000.00 face value of Income Bonds and 1200 shares of stock still to be distributed. On the same date all but 1,714 shares of preferred stock in the old company, out of 20,000 shares, and all but 20,572 shares of common stock in the old company, out of 340,505 shares, had been exchanged for warrants. On the same date only 465 shares of stock in the new company had been issued for cash upon the exercise of the warrants; all as recited in Exhibit "M", the extract from the Final Report of the Trustee. The first exercise of the warrant options for purchase of stock in the new company occurred on October 23, 1936, and it was for 37 shares.

11. Immediately after the consummation of the plan of liquidation, 552,660 shares of stock of the new company were issued, and all of these shares belonged to the holders of Industrial Bonds in accordance with the provisions of the Plan and the order of April 25, 1936. No stock was issued to parties other than the Industrial bondholders until October 23, 1936, and by June 30, 1938 only 465 shares had been issued to other parties (the 465 shares referred to above as issued upon the exercise of warrants). The warrant agreement, Exhibit "J", provided, in Article Twelfth thereof, that the holders of warrants should not have the right to vote or to receive notice as stockholders, nor should they have any rights whatsoever as stockholders.

12. On the date of exchange the fair market value of the securities received in exchange for Industrial Bonds was \$79.00 for each \$100.00 face amount of Income Bonds and \$27.25 for each share of stock in the

new company, a total of \$37,884.00. The adjusted basis of the Industrial Bonds in the hands of petitioner was \$14,893.25.

By Order of Court, dated October 12, 1938, and filed November 18, 1938, copy of which, marked "Exhibit "N", is attached hereto and by this reference made a part hereof, the reorganization proceedings were concluded and the Trustee discharged.

It is further stipulated and agreed that either party hereto may introduce such further and additional evidence, not inconsistent with the facts above stipulated, as may be material to any of the issues herein, and that the exhibits attached hereto and referred to herein may be given the same force and effect as if the same had been duly offered and received in evidence in open court.

Dated this 19th day of September, 1939.

JAMES B. GRANT.  
STEPHEN H. HART,  
Stephen H. Hart,  
Counsel for Petitioner.

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J. P. Wenchel,  
Chief Counsel, Bureau of  
Internal Revenue.

(Filed at Hearing, Sep. 21, 1939.)

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Exhibit "A"

39

RETURN OF THE CORPORATION INCOME AND EXCESS-PROFITS TAX FOR CALENDAR YEAR 1936

# CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN For Calendar Year 1936

Page 1 of Return

Form 1120  
THE GENERAL INSTRUCTIONS  
FOR THE RETURN OF THE CORPORATION

(Circular Return)

1936

Calendar Year began 1936, and ended 1937

CHRYST INVESTORS, INC.

104 HORTON BUILDING

DANVER, COLORADO

65  
400714 EP  
940447

SEC 872-REV ACT 1935  
Income Tax \$ 726.88  
Payable  
Interest  
Dividend  
Total  
Am. for C. & C. Unit  
Last  
Page 1120

## EXCESS-PROFITS TAX COMPUTATION

|  |              |        |
|--|--------------|--------|
| 1. Net income subject to excess-profits tax (amount of item 6)                       | 1,000,000.00 | 726.88 |
| 2. Amount taxable at 6 percent (item 1, or 6 percent of item 1, whichever is less)   | 60,000.00    | 3.76   |
| 3. Amount taxable at 12 percent (item 1, or 12 percent of item 1, whichever is less) | 120,000.00   | 7.52   |
| 4. Excess-profits tax at 6 percent (6 percent of item 2)                             | 3,600.00     | 2.26   |
| 5. Excess-profits tax at 12 percent (12 percent of item 3)                           | 14,400.00    | 8.98   |
| 6. Total excess-profits tax (total of items 4 and 5)                                 | 18,000.00    | 11.24  |

Note.—Where an affiliated group of related corporations makes a consolidated income tax return, the excess-profits tax return is filed for the making of an excess-profits tax return must make a separate excess-profits tax return on this form. (See Instruction 10.)

## INCOME TAX COMPUTATION

### NORMAL TAX

|  |              |        |
|--|--------------|--------|
| 1. Net income for normal tax computation (item 6, page 2)  | 1,000,000.00 | 726.88 |
| 2. Less: Interest on obligations of United States, etc. (item 2, page 2)   | 718.08       |        |
| 3. Dividends received credit (66 percent of item 15 (a), page 2) (this credit not allowed to certain investment companies) | 608,088.84   |        |
| 4. Dividends paid credit (this credit allowed only to certain investment companies)  | 608,088.84   |        |
| 5. Normal-tax net income (item 15 where items 14 and 15 or 14 and 16)  | 1,000,000.00 | 726.88 |
| 6. Tax on portion of item 5, not in excess of \$10,000   | 1,000.00     | 1.00   |
| 7. Tax on portion of item 5, in excess of \$10,000 and not in excess of \$14,000   | 14,000.00    | 1.40   |
| 8. Tax on portion of item 5, in excess of \$14,000 and not in excess of \$20,000   | 20,000.00    | 2.00   |
| 9. Tax on portion of item 5, in excess of \$20,000   | 780,000.00   | 78.00  |
| 10. Total Normal Tax (Amount of tax in items 6 to 9, inclusive)  | 100,400.00   | 78.40  |

\* Foreign corporations engaged in trade or business within the United States or having an office or place of business in the United States are taxable at the rate of 28 percent on item 17, and (c) certain banks and trust companies (see Instruction 21), (d) corporations entitled to the benefits of Section 204 of the Revenue Act of 1935, (e) corporations organized under the China Trade Act, 1923, and (f) insurance companies are taxable at the rate of 18 percent on item 17, instead of at the rates prescribed in items 6 to 9. In such cases the method of tax should be entered on item 22, and the taxpayer's classification should be indicated by a check mark (✓) in the appropriate line given in this table.

### SURTAX ON DISTRIBUTED PROFITS

(See Instruction 22) (Applying corporations exempt from surtax)

|   |              |        |
|---|--------------|--------|
| 1. Net income for surtax computation (item 6, page 2)   | 1,000,000.00 | 726.88 |
| 2. Less: Normal tax (item 10, above)  | 100,400.00   |        |
| 3. Interest on obligations of United States, etc. (item 2, page 2)  | 718.08       |        |
| 4. Credit allowable to holding company affiliates (see Instruction 22)  |              |        |
| 5. Credit allowable to national mortgage associations (see Instruction 24)  |              |        |
| 6. Adjusted net income (item 15 where items 14-17)  | 1,000,000.00 | 726.88 |
| 7. Less: Dividends paid credit (see Instruction 22)   | 608,088.84   |        |
| 8. Credit for corporate withholding dividend payments (see Instruction 22)  |              |        |
| 9. Undistributed net income (item 15 where items 14-17)   | 1,000,000.00 | 726.88 |
| 10. Less: Specific credit allowable only where undistributed net income (item 9, above) is less than \$20,000 (item 11 or \$4,000, whichever is less, where 10% of item 9) (see Instruction 27) | 1,000,000.00 | 726.88 |
| 11. Remainder subject to surtax (item 9 minus item 10)  | 1,000,000.00 | 726.88 |
| 12. Tax on portion of item 11 not in excess of 10% of item 9  | 72,688.00    | 7.27   |
| 13. Tax on portion of item 11 in excess of 10% and not in excess of 20% of item 9   | 80,000.00    | 8.00   |
| 14. Tax on portion of item 11 in excess of 20% and not in excess of 30% of item 9   |              |        |
| 15. Tax on portion of item 11 in excess of 30% and not in excess of 40% of item 9   |              |        |
| 16. Tax on portion of item 11 in excess of 40% and not in excess of 50% of item 9   |              |        |
| 17. Tax on portion of item 11 in excess of 50% of item 9  |              |        |
| 18. Amount of tax in items 12 to 17, inclusive  | 152,688.00   | 15.27  |
| 19. Plus: 7% of amount of specific credit (item 10)   |              |        |
| 20. Total Surtax (item 18 plus item 19)   | 152,688.00   | 15.27  |
| 21. Total Normal Tax and Surtax (item 10 plus item 20)  | 253,088.00   | 25.54  |
| 22. Less: Income tax paid to a foreign country or United States possession by a domestic corporation (see Instruction 23)   |              |        |
| 23. Balance of Tax (item 21 minus item 22)  | 253,088.00   | 25.54  |



Date of incorporation October 2, 1934 Under the laws of what State or country Delaware **53**The corporation's books are in care of L. A. Torgans Located at Denver, ColoradoKind of business (in detail) Investments Is this a consolidated return of railroad corporation? No **54**  
(Also check railroad status on page 3)

of how many corporations?

If this is not a consolidated income tax return of railroad corporation, did the corporation at any time during its taxable year own 10 percent or more of the voting stock of another corporation or corporations? No If so, attach separate schedule showing with respect to each corporation: (1) name and address of corporation, (2) percentage of stock owned, (3) date stock was acquired, and (4) the collector's office in which the corporation's income tax return for the taxable year was filed.

Is the corporation a personal holding company within the meaning of Section 561 of the Revenue Act of 1937? Yes (If so, in addition return on Form 1120H must be filed.)

Did the corporation make a return of information on Forms 999B and 999C (see Instruction 46) for the calendar year 1937? Yes

## NET INCOME COMPUTATION

| Line  | Amount | Less | Net |
|---|--------|------|-----|
| 1. Gross Sales (where investments are on income-determining basis), <u>\$</u>                                       |        |      |     |
| 2. Cost of Goods Sold:  |        |      |     |
| (a) Inventory at beginning of year  |        |      |     |
| (b) Materials or merchandise bought for manufacture or sale   |        |      |     |
| (c) Manufacturing costs (from Schedule A, Column 1):  |        |      |     |
| (1) Salaries and wages, <u>\$</u>   |        |      |     |
| (2) Other costs, <u>\$</u>  |        |      |     |
| (d) Total of lines (b), (c), and (d)  |        |      |     |
| (e) Less inventory at end of year   |        |      |     |
| 3. Gross Profit from Sales (Line 1 minus Line 2)  |        |      |     |
| 4. Gross Receipts (where investments are not on income-determining basis), <u>\$</u>                                |        |      |     |
| 5. Less cost of operations (from Schedule A, Column 1):   |        |      |     |
| (a) Salaries and wages, <u>\$</u>   |        |      |     |
| (b) Other costs, <u>\$</u>  |        |      |     |
| 6. Gross Profit where investments are not on income-determining basis (Line 4 minus Line 5)                         |        |      |     |
| 7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.  |        |      |     |
| 8. Interest on Government obligations, etc. (from Schedule B, Lines 6 (a) (b) and (7))                              |        |      |     |
| 9. Dividends  |        |      |     |
| 10. Depreciation  |        |      |     |
| 11. Capital Gain or Loss (from Schedule D) (If loss, enter with loss or \$0.00, whichever is less)                  |        |      |     |
| 12. Dividends on Stock of:  |        |      |     |
| (a) Domestic Corporations subject to taxation under Title 1 of Revenue Act of 1938                                  |        |      |     |
| (b) Domestic Corporations not subject to taxation under Title 1 of Revenue Act of 1938                              |        |      |     |
| (c) Foreign Corporations  |        |      |     |
| 13. Other Income (State nature of income) (file separate schedule, if necessary)                                    |        |      |     |
| 14. Total Income or Loss (Sum of Lines 3 and 6 to 13, whichever)  |        |      |     |
| 15. Deductions:   |        |      |     |
| 16. Compensation of Officers (from Schedule C)  |        |      |     |
| 17. Rent on Business Property   |        |      |     |
| 18. Repairs (from Schedule E): (a) Salaries and Wages, <u>\$</u> ; (b) Other Costs, <u>\$</u> ; Total               |        |      |     |
| 19. Bad Debts (from Schedule F); also losses determined to be worthless during taxable year (attach separate sheet) |        |      |     |
| 20. Interest Paid (from Schedule G)   |        |      |     |
| 21. Taxes Paid (from Schedule H) (Do not include Federal Income-Tax Reported in Item 25, below)                     |        |      |     |
| 22. Contributions or Gifts (from Schedule I)  |        |      |     |
| 23. Losses by Fire, Storm, etc. (from Schedule J)   |        |      |     |
| 24. Depreciation (resulting from amortization, wear and tear, or obsolescence) (from Schedule K)                    |        |      |     |
| 25. Deduction of Meals, Oil and Gas Wells, Timber, etc. (attach schedule, see Instruction 34)                       |        |      |     |
| 26. Other Deductions Authorized by Law (specify below, or on separate sheet):                                       |        |      |     |
| (a) Salaries and wages (Not included in Lines 3, 6, 14, or 17 above)  |        |      |     |
| (b) Stock determined to be worthless during the taxable year  |        |      |     |
| (c) Schedule Attached   |        |      |     |
| 27. Total Deductions or Losses (Sum of Lines 15 to 26, inclusive)   |        |      |     |
| 28. Net Income for Federal Income-Tax Computation (Line 14 minus Line 27)   |        |      |     |
| 29. Less: Federal Income-Tax Paid (from 25, Page 1)   |        |      |     |
| 30. Net Income for Federal Tax Computation (Line 28 minus Line 29)  |        |      |     |

U. S. GOVERNMENT PRINTING OFFICE: 1967

**SCHEDULE D—CAPITAL GAINS AND LOSSES (FROM SALES OR EXCHANGES ONLY)** (See instructions.)

Give on Line (enter not amount in Item 11, page 7; if not amount is a loss, enter that amount or \$1,000, whichever is less)

Every sale or exchange of stock should be reported in detail, including name and address of corporation, date of stock, number of shares, partial exchanges showing both stock acquired, other securities obtained, stock rights, etc.).

**Cost of property must be reduced to extent it is a loss to debtor in return.**

Form Schedule O-4 (IF APPLICABLE) also used to file with this return if compensation in excess of \$15,000 was paid to any officer or employee.

Produce below all documents received during the year, listing the source of the information and the date received.

**SCHEDULE F—BAD DEBTS (See Instruction 10)**

**STEWART C. STERNSTADT PAID** (See Instructions 19)

**SCHEDULE B—VALUE PAID** (See Instructions to Form 990)

| 1. Amount in U.S. | 2. To What Use                 | 3. Date of Payment |
|-------------------|--------------------------------|--------------------|
| Treasury Tax      | Secretary of State of Missouri | 7/1/00             |
| Capital Stock Tax | Collector of Internal Revenue  | 1000.00            |
|                   |                                | 1075.00            |

**SCHEDULE 2-EXPLANATION OF INSTRUCTIONS FOR LOGS BY FIRM, STATION, ETC. (See Instruction 22)**

[illegible]

State how property was acquired.

**SCHEDULE E—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instructions)**[illegible]

## RATINGS OF SYMPTOMS

1. Check the status of reference the individual desires to obtain the reporter's past news stories by returning this:

- [illegible]

**AFFILIATIONS WITH OTHER ORGANIZATIONS (No response in**

1. Is this a confidential source? Yes If so, please state the nature of the information received from your source: From Mr. J. William Smith, who said in 1964 he was in and out of a part of the report.

2. Was the source of the information included in a confidential source for any other purpose? Yes, for the purpose of obtaining information which the confidential source said he had for the purpose of obtaining the same.

**FOOTNOTES**

4. Will the corporation file a return under the name name for the preceding taxable year? Yes.  
Was the corporation in any way an employer, agent, contractor, or representative of a business or business in existence during this or any prior year close December 31, 1977? Yes. If  
answer is "yes", give name and address of each predecessor business, and the date of the change in  
ownership.

Reorganization General Securities Co.  
October 10, 1934

Do you think change may ever come without agreement or compromise? **Yes**  
If the answer is "yes", sharing indicates choice of the harmonious and opposing balance theory of your individual mind is harmonious.

### BASES OF SUPPLIES

5. To this return made on the basis of cash receipts and disbursements? Yes

### VALUATION OF INVENTORIES

6. State whether the committee at the beginning and end of the taxable year were advised in writing of such a matter, whichever is later. If other facts are stated, describe fully those facts and what the committee was last requested with respect to such

PREPARATION OF BATTERY (See "Operation and Maintenance", page 6)

7. Did any person or persons within the corporation in respect of any securities or matter affecting any bond or debenture of this corporation, or stock or debenture of this corporation in the possession of this corporation, or actually owning this money for the purpose—

**Yes**

8. If so, give the name and address of each person or persons who held the money and address of the corporation or address received, and the name and residence in respect of which the certificate of address was received, if the money was actually paid by any person or persons other than the corporation, state the source of the subscription reported in this return and the manner in which it was transported to or received for deposit as "money of persons."

### O. F. Counts

**DUNBAR, Cole.**

**LIST OF ATTACHED DOCUMENTS**

8. Place under a lot of all absolute numbers of the study, giving for each a brief note and the absolute number. The notes and tables of the argument should be placed in each separate absolute subpage of the report.

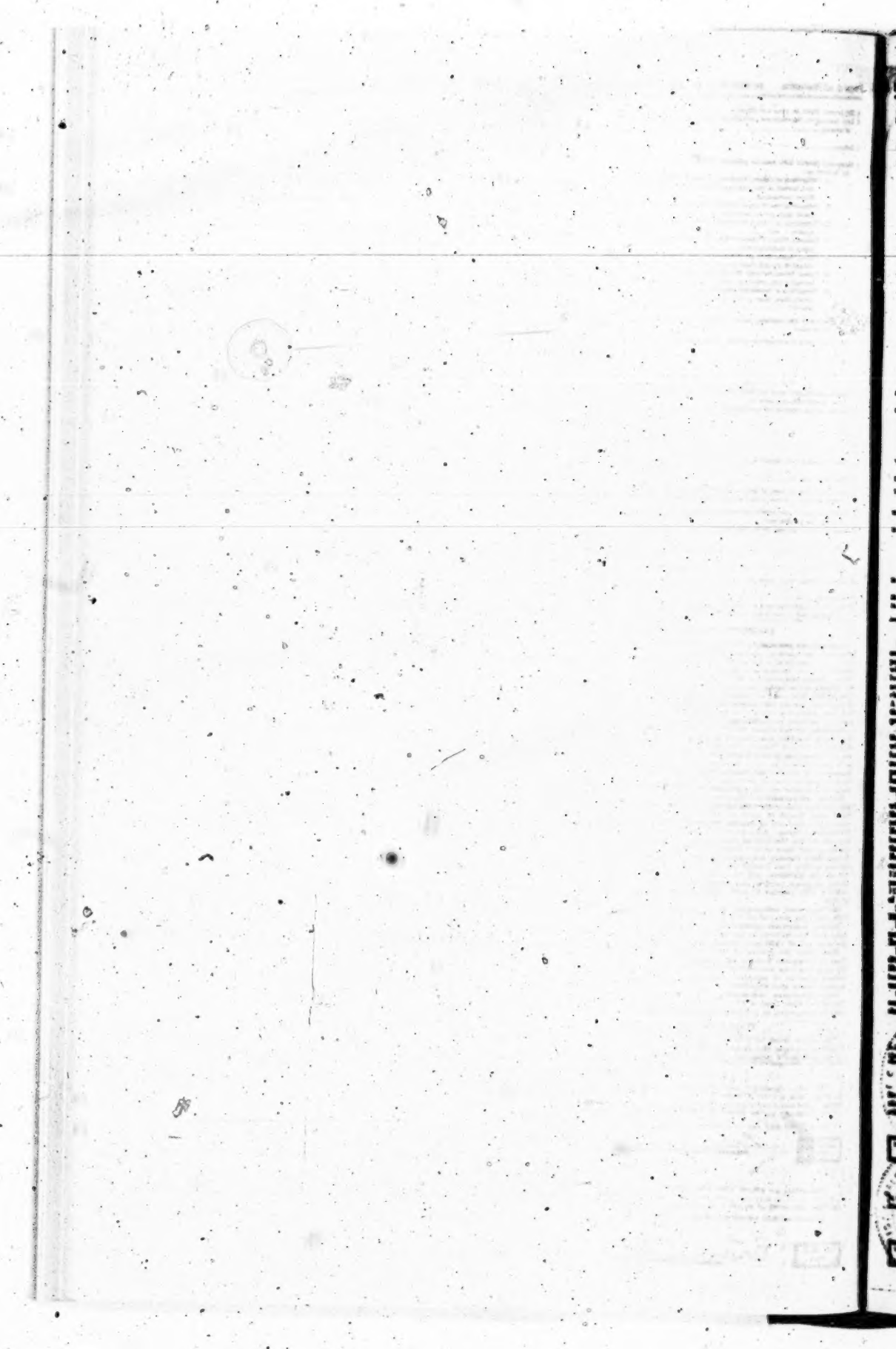
**Dividends Received  
Capital Gains & Losses  
Other Deductions**

Form of Return

## SCHEDULE L—BALANCE SHEETS (See Instructions on Page 2)

| Item  | Amount or Value Paid |             | Due or Value Paid |             | Total        |    |
|---|----------------------|-------------|-------------------|-------------|--------------|----|
|   | Assets               | Liabilities | Assets            | Liabilities |              |    |
| <b>ASSETS</b>   |                      |             |                   |             |              |    |
| 1. Cash:  |                      |             |                   |             |              |    |
| (a) Demand deposits, including checks   | 72                   | 727         | 00                |             | 72 727 00    |    |
| (b) Time deposits, including certificates of deposit  |                      |             |                   |             |              |    |
| (c) All other cash  |                      | 72          | 727               | 00          | 72 727 00    |    |
| 2. Notes receivable   |                      |             |                   |             |              |    |
| 3. Accounts receivable  |                      |             |                   |             |              |    |
| 4. Investments:   |                      |             |                   |             |              |    |
| (a) Real estate   |                      |             |                   |             |              |    |
| (b) Work in process   |                      |             |                   |             |              |    |
| (c) Finished goods  |                      |             |                   |             |              |    |
| (d) Shipments   |                      |             |                   |             |              |    |
| 5. Investments (continued):   |                      |             |                   |             |              |    |
| (a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States Government |                      |             |                   |             |              |    |
| (b) Obligations issued under Federal Farm Loan Act, or under such Act as amended  |                      |             |                   |             |              |    |
| (c) Liberty 5 1/2% Bonds and other obligations of United States issued on or before September 1, 1917                             |                      |             |                   |             |              |    |
| (d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness   |                      |             |                   |             |              |    |
| (e) Liberty 4% and 4 1/2% Bonds, United States Savings Bonds, and Treasury Bonds  |                      |             |                   |             |              |    |
| (f) Obligations of instrumentalities of the United States (other than obligations to be reported in line (a) above)               |                      |             |                   |             |              |    |
| 6. Other investments:   |                      |             |                   |             |              |    |
| (a) Stocks of domestic corporations   | 2                    | 000         | 000               | 17          | 2 000 000 17 |    |
| (b) Stocks of domestic corporations   | 75                   | 434         | 61                |             | 75 434 61    |    |
| (c) Stocks and bonds of foreign corporations  |                      |             |                   |             |              |    |
| (d) All other investments or loans  |                      |             |                   |             |              |    |
| 7. Deferred charges:  |                      |             |                   |             |              |    |
| (a) Prepaid insurance   |                      |             |                   |             |              |    |
| (b) Prepaid taxes   |                      |             |                   |             |              |    |
| (c) All other   |                      |             |                   |             |              |    |
| 8. Capital assets:  |                      |             |                   |             |              |    |
| (a) Buildings   |                      |             |                   |             |              |    |
| (b) Machinery and equipment   |                      |             |                   |             |              |    |
| (c) Furniture and fixtures  |                      |             |                   |             |              |    |
| (d) Delivery equipment  |                      |             |                   |             |              |    |
| (e) Other depreciable assets  |                      |             |                   |             |              |    |
| (f) Loans or loans (a) to (e)   |                      |             |                   |             |              |    |
| (g) Less reserves for depreciation  |                      |             |                   |             |              |    |
| (h) Depreciable assets  |                      |             |                   |             |              |    |
| (i) Less reserves for depreciation  |                      |             |                   |             |              |    |
| (j) Land  |                      |             |                   |             |              |    |
| 9. Patents  |                      |             |                   |             |              |    |
| 10. Good will   |                      |             |                   |             |              |    |
| 11. Other assets (describe fully):  |                      |             |                   |             |              |    |
| 12. Total Assets  |                      |             | 2                 | 748         | 124          | 14 |
| <b>LIABILITIES</b>  |                      |             |                   |             |              |    |
| 13. Notes payable (less than 1 year)  |                      |             |                   |             |              |    |
| 14. Accounts payable  |                      |             |                   |             |              |    |
| 15. Bonds and notes (not secured by mortgages)  |                      |             |                   |             |              |    |
| 16. Mortgages (including bonds and notes to owners):  |                      |             |                   |             |              |    |
| 17. Accrued expenses:   |                      |             |                   |             |              |    |
| (a) Interest  |                      |             |                   |             |              |    |
| (b) Taxes   |                      |             |                   |             |              |    |
| (c) All other   |                      |             |                   |             |              |    |
| 18. Other liabilities (describe fully):   |                      |             |                   |             |              |    |
| 19. Capital stock:  |                      |             |                   |             |              |    |
| (a) Preferred stock (less stock in treasury)  |                      |             |                   |             |              |    |
| (b) Common stock (less stock in treasury)   |                      |             |                   |             |              |    |
| 20. Surplus   |                      |             |                   |             |              |    |
| 21. Undistributed profits   |                      |             |                   |             |              |    |
| 22. Total Liabilities   |                      |             | 2                 | 748         | 124          | 14 |











## Cement Investors, Inc.

## Dividends Received.

1936.

| Name                                    | Amount     |
|---|------------|
| Alpha Portland Cement Company           | 67,485.00  |
| Ideal Cement                            | 465,790.75 |
| Lehigh Portland Cement Co. "Pfd."       | 1,150.00   |
| Lehigh Portland Cement Co. "Com."       | 400.00     |
| Lone Star Cement Company "Common"       | 764.60     |
| Missouri Portland Cement                | 1,680.00   |
| Oregon Portland Cement 7% 1st Pfd.      | 2,842.00   |
| Oregon Portland Cement 7% Conv. Pfd.    | 351.00     |
| Southwestern Portland Cement Co. "Pfd." | 36,046.65  |
| Southwestern Portland Cement Co. "Com." | 138,779.63 |
| International Cement Co.                | 75.00      |
|   | <hr/>      |
|   | 715,364.63 |

Cement Investors, Inc.  
Capital Gains and Losses

|  | Cost      | Sold<br>For | Profit<br>or Loss |
|--|-----------|-------------|-------------------|
| Ideal Cement Co. 15 Year<br>5% Debentures acquired<br>10/10/34—called 1/21/36          | 19,029.69 | 41,004.00   | 21,974.31         |
| International Cement 20<br>Year 5% Debentures—ac-<br>quired 10/10/34—called<br>1/14/36 | 13,978.75 | 25,812.50   | 11,833.75         |
| United States Treasury<br>Bonds 11½% due 3/15/39<br>acquired 2/25/36—Sold<br>7/16/36   | 25,382.81 | 25,289.06   | (93.75)           |
|  | <hr/>     | <hr/>       |                   |
| Totals   | 58,391.25 | 92,105.56   | 33,714.31         |

## Other Deductions.

|                                   |          |
|-----------------------------------|----------|
| Insurance & Postage               | 22.07    |
| Traveling Expense                 | 2,378.50 |
| Stationery and Office Expense     | 22.66    |
| Filing Fee (State Report)         | 2.00     |
| Statutory Representation—Delaware | 50.00    |
|                                   | <hr/>    |
| Total                             | 2,475.23 |

Form 1120—Schedule N  
Treasury Department  
Internal Revenue Service

# Analysis of Dividends Paid and Receipts and Expenditures on Account of Changes in Corporation's Obligations and Capital Stock

For Calendar Year 1936

Or fiscal year begun....., 1936, and ended....., 1937

This schedule together with green copy marked "Duplicate", must be filed with and as part of the corporation income and excess-profits tax return for the taxable year.

Print plainly corporation's name and business address

Cement Investors, Inc.

(Name)

104 Boston Building

(Street and number)

Denver, Colorado

(Post office)

(County)

(State)

(Date received)

List below all dividends paid during the taxable year, stating in each case the character of the dividend and entering the amounts in the proper columns respecting the taxable status of the dividends. If the total amount shown below differs from that reported in Schedule M, item 17, explain the difference at the end of this schedule. Dividends paid in treasury stock should be entered in item 2 and not in items 5 through 8. It is essential that dividends in which the medium of payment is elected by the shareholders be carefully reported in item 9; and correspondingly excluded from items 1 through 8.

| Character of Dividend  | Taxable Dividends<br>(1) | Nontaxable Dividends<br>(2) | Total<br>(3)  |
|--|--------------------------|-----------------------------|---------------|
| Item No.   |                          |                             |               |
| 1. Cash  | \$ 578 853 00            | \$                          | \$ 578 853 00 |
| 2. Treasury stock  |                          |                             |               |
| 3. Assets other than money or the corporation's own securities<br>(Explain character of each payment; use separate schedule if necessary.) |                          |                             |               |
| 4. Obligations of the corporation (bonds, notes, scrip, etc.)  |                          |                             |               |
| 5. Common stock of the corporation to holders of preferred* stock  |                          |                             |               |
| 6. Preferred* stock of the corporation to holders of preferred* stock  |                          |                             |               |
| 7. Preferred* stock of the corporation to holders of common stock  |                          |                             |               |
| 8. Common stock of the corporation to holders of common stock  |                          |                             |               |
| 9. Optional—Medium of payment elected by the shareholders.<br>(List below separately the amounts disbursed in each medium of payment):     |                          |                             |               |
| Cash   |                          |                             |               |
| Common stock   |                          |                             |               |
| Other (specify character)  |                          |                             |               |
| 10. Total (items 1 to 9)   | \$ 578 853 00            | \$                          | \$ 578 853 00 |
| 11. Dividends paid credit (item 29, page 1 of return)  | 578 853 00               |                             | 578 853 00    |
| 12. Dividends carry-over (item 10 minus item 11)   |                          |                             |               |

\* Preferred stock for this purpose should be considered as stock which is preferred as to either dividends or assets irrespective of formal designation.

(Continued on reverse side)



| Item No.  | Interest-bearing obligations with original maturity of 1 year or less | Interest-bearing obligations with original maturity of over 1 year | Preferred* stock | Common stock | Total   |
|---|---|--|------------------|--------------|---------|
| 13. Net increase or decrease during taxable year in amount outstanding of corporation's interest-bearing obligations with original maturity of 1 year or less (indicate decrease by minus sign)   | \$-----   | X X X X X  | X X X X          | X X X X      | \$----- |
| 14. Net proceeds during taxable year from sale of corporation's own interest-bearing obligations and capital stock (other than obligations with original maturity of 1 year or less)              | X X X X X   | \$-----  | \$-----          | \$-----      | -----   |
| 15. Net amounts expended during taxable year for retirement of corporation's own interest-bearing obligations and capital stock (other than obligations with original maturity of 1 year or less) | X X X X X   | -----  | -----            | -----        | -----   |
| 16. Net increase or decrease (sum of items 13 and 14 less item 15)  | -----   | -----  | -----            | -----        | -----   |

\* Preferred stock for this purpose should be considered as stock which is preferred as to either dividends or assets irrespective of formal designation.



# RETURN OF PERSONAL HOLDING COMPANY

SUBJECT TO REGULATION UNDER SECTION 221 OF THE REVENUE ACT OF 1926  
For Calendar Year 1926

or First Year begins 1926, and ends 1926

CHERRY INVESTORS, INC.

104 HUNTER BUILDING

DENVER, COLORADO

It is certified that this return is complete and correct in accordance with the provisions of the Revenue Act of 1926.

Notes:—If return on this form may be made even though section 221(a) of the Revenue Act of 1926 the return does not apply. In such event only lines 1 to 9 and Schedule A need be filled in. (See Regulations 133.)

Did any person or persons advise the corporation in respect of any question or matter affecting any item or schedule of this return, or assist or advise the corporation in the preparation of this return, or actually prepare this return for the corporation? If so, give the name and address of each person or persons and state the nature and extent of the assistance or advice rendered and the time and date when the assistance or advice was rendered; if the return was actually prepared by any person or persons other than the corporation, state the source of the information reported in this return and the manner in which it was furnished to or obtained by each person or persons.

The questions above should be answered fully, and where the return is actually prepared by some person or persons other than the corporation, each person or persons must execute the affidavit at the foot of this page.

## ADJUSTED NET INCOME (See Instructions 4)

|   |            |
|---|------------|
| 1. Net income (as defined in Title I of the Revenue Act of 1926)  | 753 615 08 |
| 2. Deductions on stock of domestic corporations subject to taxation under Title I of the Revenue Act of 1926 (See Instructions 4) | 753 615 08 |
| 3. Total of lines 1 and 2   |            |
| 4. Less: Federal income, war-profits, and excess-profits taxes (See Instructions 4)   | \$1 854 97 |
| 5. Contributions or gifts (See Instructions 4)  |            |
| 6. Amount from sale or exchange of capital assets (See Instructions 4)  |            |
| 7. Income tax paid to a foreign country or U. S. possession and allowed as deduction (See Instructions 4)                         |            |
| 8. Total of lines 4, 5, 6, and 7  | \$1 854 97 |
| 9. ADJUSTED NET INCOME (See Instructions 4)   | 707 158 31 |

## UNADJUSTED ADJUSTED NET INCOME (See Instructions 5)

|   |             |
|---|-------------|
| 10. Adjusted net income (See Instructions 5)                            | 707 158 31  |
| 11. Less: Deductions from personal holding company (See Instructions 5) |             |
| 12. Deduction from line 10 (See Instructions 5)                         | 707 158 31  |
| 13. 80% of line 12  | 565 726 65  |
| 14. Amount used or set aside for other individuals (See Instructions 5) |             |
| 15. Deductions paid during year   | \$72 834 72 |
| 16. Total of lines 13 and 15  | 728 561 37  |
| 17. UNADJUSTED ADJUSTED NET INCOME (See Instructions 5)                 | 707 158 31  |

## COMPUTATION OF TAX (See Instructions 6)

|   |  |
|---|--|
| 18. Unadjusted adjusted net income (See Instructions 6) |  |
| 19. Amount taxable at rate of 10% (See Instructions 6)  |  |
| 20. Amount taxable at rate of 20% (See Instructions 6)  |  |
| 21. Return on line 19 (See Instructions 6)              |  |
| 22. Return on line 20 (See Instructions 6)              |  |
| 23. TOTAL TAXABLE (See Instructions 6)                  |  |

## AFFIDAVIT (See Instructions 6)

I, the undersigned, president for the president, or other principal officer and shareholder for resident taxpayers, or stock owning officer of the corporation for which this return is made, being personally duly sworn, each for himself depose and say that this return (including its accompanying schedules and statements, if any) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1926 and the Regulations thereunder.

Subscribed and attested before me this 1926

*James Brown*  
Notary Public

*W. H. Hutton*  
President

*W. H. Hutton*  
Secretary

You swear to affirm that you prepared this return for the corporation and that you are the person (including its accompanying schedules and statements, if any) in a true, correct, and complete statement of all the income and deductions of the corporation for the taxable year stated, to the best of your knowledge and belief.

Subscribed and attested before me this 1926

*James Brown*  
Notary Public

*W. H. Hutton*  
Secretary

STANDARD A—Stocks (Over Domestic Corporations Subject to Taxation Under Title I of the Revenue Act of 1936)

[illegible]

**EXHIBIT B--Federal Income, War-profits, and Excess-profits Taxes**

1. State the amount of Federal income, war-profits, and excess-profits taxes paid or accrued during the year, stating the amount and year for which paid or accrued.

**SCENARIO C—Statement of Constitution (See Instruction 2)**

[illegible]

**SCHEDULE D - Payment of Series on Pro Rate Basis (See Instruction 1B)**  
 (Fill in only if section 102(b) of the Revenue Act of 1954 applies)

[illegible]

**SCHEDULE B—Deductions Claimed for Amounts Used or Not Added to Net Income in Prior Years**

[illegible]

A complete statement setting forth the information required by Instruction 3 must be given below. (Attach additional sheets, if necessary.)

**Exhibit D**

**In the  
District Court of the United States  
For the District of Colorado.**

|   |  |
|---|--|
| <b>In the Matter<br/>of<br/>The Colorado Fuel and Iron Com-<br/>pany and Another, Colorado cor-<br/>porations,<br/>Debtors.</b> | <b>In Proceedings<br/>for Reorganization<br/>Consolidated Cause<br/>No. 8081</b> |
|---|--|

**Plan of Reorganization  
of  
The Colorado Fuel and Iron Company  
(and The Colorado Industrial Company)**

**Dated March 1, 1935**

**Proposed by The Colorado Fuel and Iron Company and The  
Colorado Industrial Company pursuant to Section  
77B of the Bankruptcy Act**

The statements, opinions, computations, estimates, conclusions, etc., contained in the Introductory Statement, the Plan and the Exhibits to the Plan (1) are submitted by The Colorado Fuel and Iron Company and are not made by or joined in by the Trustee or by any of the Committees or by the Reorganization Managers; (2) are made solely for the purpose of assisting the Court (after hearing) in the reorganization proceedings, and creditors, stockholders and other parties in interest, in making a determination as to the fairness of the Plan; and (3) are not intended for the use or information of prospective purchasers of any securities referred to in the Plan, whether now existing or proposed to be issued, or for any purpose other than the purpose stated in (2); and no one is authorized to make any statement regarding the Plan, whether with reference to any securities referred to therein or otherwise which is not set forth herein.

**Protective Committee****The Colorado Industrial Company****First mortgage five per cent. thirty year gold bonds.**◊ **Guaranteed by****The Colorado Fuel and Iron Company**

|                                     |   |
|-------------------------------------|---|
| <b>Carl J. Schmidlapp, Chairman</b> | <b>Milbank, Tweed, Hope &amp; Webb,</b> |
| <b>Bertram Cutler</b>               | <b>15 Broad Street, New York,</b>       |
| <b>John Evans</b>                   | <b>N. Y.,</b>                           |
| <b>Frank Miller Gould</b>           | <b>W. Rice Brewster, Secretary,</b>     |
| <b>R. G. Page</b>                   | <b>15 Broad Street, New York,</b>       |
| <b>John D. Rockefeller, 3rd</b>     | <b>N. Y.</b>                            |

**Protective Committee****March 6, 1935.****To holders of the above Bonds:**

This Committee has given careful consideration to the Plan of Reorganization dated March 1, 1935 which has been formulated by Messrs. J. & W. Seligman & Co. pursuant to the request of this Committee and the Committee for the General Mortgage 5% Bonds of The Colorado Fuel and Iron Company. From our study of the history and present condition of the affairs of The Colorado Fuel and Iron Company, it is apparent that the present position of the Company necessitates a radical readjustment of its capital structure and consequent alteration of the character of securities to be taken by the Industrial Bondholders in the reorganized company. The Plan itself states the principles upon which its provisions are based and the reasons for the treatment accorded to the various classes of securities. We concur in these principles and we believe that a sound readjustment can be effectively accomplished under the Plan proposed, upon a basis which we consider fair to the Industrial Bondholders.

Accordingly this Committee has approved the Plan and recommends its acceptance by the holders of the Industrial Bonds.

**Carl J. Schmidlapp, Chairman.**



**Protective Committee  
The Colorado Fuel and Iron Company  
Preferred Stock and Common Stock**

**Committee**  
**Grayson M.-P. Murphy,**  
**Chairman**  
**John W. Hanes**  
**Andrew V. Stout**  
**T. Johnson Ward**

**Secretary**  
**Tristan Antell**  
**52 Broadway, New York**  
**Counsel**  
**Cotton, Franklin, Wright &**  
**Gordon**  
**63 Wall Street, New York**

**March 6, 1935.**

**To the holders of Preferred Stock and Common Stock:**

This Committee was formed, shortly after the beginning of the receivership, to represent the holders of Preferred and Common Stock of the Company. The serious problems presented by the Company's financial condition have been studied by the Committee, and the Committee has examined reports of engineers and accountants regarding the Company and has conferred with the Receiver and Trustee and the Reorganization Managers named in the annexed Plan of Reorganization.

Operating results of recent years (as shown in the Plan and the financial statements annexed thereto) make it clear that the properties of the Company cannot be expected to support its present debt structure, and that a drastic reduction of fixed charges must be effected. \$27,633,000 principal amount of matured bonds are in default and, unless a reorganization satisfactory to the bondholders can be carried out with reasonable promptness, the stockholders are confronted with the danger of having their interest in the property wiped out entirely.

The study made by the Committee has convinced it that stockholders must be prepared to agree to a plan which gives full recognition to the paramount rights of the bondholders, and, furthermore, that the situation here presented is one which cannot be met by any ordinary readjustment of the capital structure. The Committee believes that to effect a reorganization upon a basis which would leave the stock interests largely undisturbed would require the payment by stockholders of a substantial assessment. In the opinion of the Committee any such assessment would be impracticable under the circumstances and would



impose a severe hardship upon the stockholders. Accordingly, under the proposed Plan no contribution of cash is required of the stockholders. Instead, they are asked to give up their present holdings in exchange for warrants to purchase common stock of the reorganized company at any time prior to February 1, 1950.

While the effect of the Plan is to give the bondholders the entire present ownership and control of the reorganized company, the stockholders will retain, without assessment, an interest in the enterprise to the extent of whatever value the warrants may have, and will be afforded an opportunity, over a long period of time, to reacquire a stock interest at a price which takes into consideration the basis on which stock is now to be accepted by the bondholders.

In the opinion of the Committee the proposed Plan presents a method of reorganizing the Company on a sound basis and gives due regard to the respective rights of bondholders and stockholders. The Committee believes furthermore that the relative treatment accorded by the Plan to the holders of Preferred Stock (which has a preference on earnings and not on assets) and Common Stock is equitable in view of all the circumstances. The Committee therefore recommends immediate acceptance of the Plan by the holders of Preferred Stock and Common Stock.

The Committee is informed that Mr. John D. Rockefeller, Jr., owns substantial amounts of both classes of stock of the Company and also owns or controls a majority of the outstanding "Industrial Bonds" and substantial amounts of the "Fuel Bonds." Mr. Rockefeller has advised the Reorganization Managers that he will accept the Plan with respect to the securities owned and controlled by him.

Grayson M.-P. Murphy, Chairman.

**The Colorado Fuel and Iron Company  
(and The Colorado Industrial Company)**

**Plan of Reorganization**

**Dated March 1, 1935**

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**Introductory Statement**

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**Receivership and Reorganization Proceedings**

On August 1, 1933, The Colorado Fuel and Iron Company (hereinafter called the Present Company) defaulted in the payment of the semi-annual interest due on \$32,179,000 principal amount of bonds then outstanding in the hands of the public. On the same day, a receiver for the properties of the Present Company was appointed by the United States District Courts for the Districts of Colorado and Wyoming. This default followed large operating deficits during the preceding two and one-half years.

On August 1, 1934, \$27,633,000 principal amount of The Colorado Industrial Company First Mortgage 5% Bonds, which are unconditionally guaranteed by the Present Company, matured by their terms and the Present Company was unable to provide for the payment of such bonds. On the same day, the Present Company filed a petition for reorganization in the United States District Court for the District of Colorado under Section 77B of the Bankruptcy Act. Contemporaneously therewith, The Colorado Industrial Company (a wholly-owned subsidiary of the Present Company which at the present time has no assets of any substantial value, having conveyed all of its properties in 1913 to the Present Company) filed its petition under said Section 77B. Mr. Arthur Roeder, President of the Present Company, who had been acting as Receiver, was appointed Trustee of the Present Company's estate (and of The Colorado Industrial Company's estate) in the reorganization proceedings and has been conducting the business under orders of the Court.

### Committees and Reorganization Managers

Following the receivership of the Present Company on August 1, 1933, the following committees were constituted for the purpose of representing bondholders and stockholders of the Present Company:

Committee (hereinafter called the Fuel Committee) for The Colorado Fuel and Iron Company General Mortgage 5% Bonds (hereinafter called the Fuel Bonds)

Thatcher M. Brown, Chairman  
Harold Kountze  
James B. Mabon  
John C. Traphagen

James D. Flaherty,  
Secretary,  
63 Wall Street,  
New York, N. Y.

Committee (hereinafter called the Industrial Committee) for The Colorado Industrial Company First Mortgage 5% Bonds (hereinafter called the Industrial Bonds)

Carl J. Schmidlapp, Chairman  
Bertram Cutler  
John Evans  
Frank Miller Gould

R. G. Page  
John D. Rockefeller 3rd  
W. Rice Brewster,  
Secretary,  
15 Broad Street,  
New York, N. Y.

Committee (hereinafter called the Stockholders Committee) for The Colorado Fuel and Iron Company Preferred and Common Stock

Grayson M.-P. Murphy, Chairman  
John W. Hanes  
Andrew V. Stout  
T. Johnson Ward

Tristan Antell,  
Secretary,  
52 Broadway,  
New York, N. Y.

As stated below, the Reorganization Managers under the Plan of Reorganization hereinafter set forth will be:

Messrs. J. & W. Seligman & Co.,  
54 Wall Street,  
New York, N. Y.

### Formulation and Proposal of Plan

In August 1933, the Fuel Committee and the Industrial Committee requested Messrs. J. & W. Seligman & Co. to formulate and submit to said Committees a plan for the reorganization of the Present Company which would be fair to all interests. In accordance with such request, Messrs. J. & W. Seligman & Co. made a study of the past and current operating results and present financial position of the enterprise and of its probable future requirements consulting in that connection with Mr. Arthur Roeder as Receiver and subsequently as Trustee, and with Messrs. Coverdale & Colpitts who were requested by the two Bondholders Committees to make a comparative study of the properties subject to the respective mortgages securing the Industrial Bonds and Fuel Bonds for the purpose of determining the relative position of these two issues in any reorganization, and a survey of the future capital requirements of the business. Following extended discussions with the two Bondholders Committees and the Stockholders Committee, Messrs. J. & W. Seligman & Co. formulated the Plan of Reorganization hereinafter set forth which in their opinion is fair to all interests and under which they are to act as Reorganization Managers on behalf of all classes of security holders. This Plan has been approved by both Bondholders Committees and the Stockholders Committee. The Industrial Committee and the Stockholders Committee, as set forth in letters prefixed hereto, recommend the acceptance of the Plan by the holders of the securities affected by the Plan. As the Fuel Bonds are to remain undisturbed in the reorganization, no action by the holders of such Bonds is required.

The Plan is proposed by the Present Company and The Colorado Industrial Company pursuant to Section 77B of the Bankruptcy Act.

### Position of the Present Company

The Present Company (including its subsidiary companies) is engaged in the manufacture of steel products and the mining and sale of coal. It has large reserves of ore, coal and most of the raw materials required in the manufacture of steel, all of which can be delivered at its plant at relatively satisfactory costs. The Plant of the Present Company, located at Pueblo, Colorado,



has, by reason of its location, certain natural distributing advantages over a considerable territory.

Primarily the Present Company is a manufacturer of steel rails and accessories, from 50 to 70 per cent. of its total steel tonnage being normally derived from this source. The Present Company, accordingly, has been adversely affected during the past four years, not only by the heavy decline in all steel demand, but particularly by the very drastic curtailment of rail purchases by the railroads. Total production of steel rails in the United States, as reported by the American Iron and Steel Institute, averaged 2,647,000 tons a year for the period 1920-1929. For the year 1930, such production was 1,873,233 tons, for 1931 1,157,751 tons, for 1932 402,566 tons, and for 1933 416,296 tons. Production for 1934, according to the preliminary figures, was in excess of 1,004,000 tons.

There is attached hereto as Exhibit A (page 11) a consolidated statement of profit and loss and surplus of the Present Company and subsidiaries for the calendar years 1926 to 1934, inclusive, with accompanying notes, which has been prepared from the published annual reports of the Present Company for the years 1926 to 1932 (for which years the consolidated accounts were certified by Messrs. Price, Waterhouse & Co.) and from information furnished by the Trustee for the years 1933 and 1934. There is attached hereto as Exhibit B (page 12) a consolidated balance sheet as of December 31, 1934, of the Present Company and subsidiaries, prepared by the Trustee.

As shown by Exhibit A, to which reference should be made for further details and explanatory notes, the earnings of the Present Company (and of the Receiver and of the Trustee) after depreciation and depletion, but before interest,\* Federal income taxes and surplus adjustments, for the years 1926 to 1934, were as follows:

---

\*Annual interest charges on the funded debt outstanding on December 31, 1934 were \$1,606,650.



**Earnings**  
(Before interest, Federal  
income taxes, and  
surplus adjustments)

|       |                     |
|-------|---------------------|
| 1926— | \$4,932,706.28      |
| 1927— | 4,588,301.16        |
| 1928— | 2,757,470.24        |
| 1929— | 4,248,095.96        |
| 1930— | 1,959,043.54        |
| 1931— | 1,710,178.68 (loss) |
| 1932— | 2,629,892.57 (loss) |
| 1933— | 1,424,287.47 (loss) |
| 1934— | 15,024.20 (loss)    |

**Object of Plan**

The operating results of recent years, and the uncertainty as to future rail purchases by the railroads on which so much of the Present Company's business depends, indicate clearly that any plan of reorganization must have as its primary objective a drastic reduction in annual fixed charges.

The Plan of Reorganization hereinafter set forth is designed to achieve this object.

Under this Plan, the fixed interest charges are reduced from approximately \$1,600,000 annually to \$225,000, representing the annual interest on \$4,500,000 of Fuel Bonds. These bonds are a first lien on certain important sections of the property essential to the operation of the enterprise as an integrated steel plant. By order of the Court, all arrears of interest on the Fuel Bonds have been paid and interest thereon is being currently paid. These bonds are to remain undisturbed and are to be assumed by the New Company.

The remaining \$27,633,000 of funded debt, represented by the Industrial Bonds, is to be replaced in part by \$11,053,200 of new 5% Income Mortgage Bonds due in 1970 and in part by common stock. These new Income Mortgage Bonds will bear no interest prior to April 1, 1936. Interest for each of the years ending March 31, 1937 and March 31, 1938 will be payable only to the extent earned in the preceding calendar year and only as and when declared by the Board of Directors in its discretion, but to the extent so earned such interest will be cumulative; interest

from April 1, 1938 will be fully cumulative at the rate of 5% per annum, and will be required to be paid to the extent earned, subject to provisions designed to protect the working capital of the New Company. All unpaid cumulative interest will be payable in any event at the maturity of the bonds. Accordingly, the present fixed charges of approximately \$1,382,000 annually on the existing Industrial Bonds will be replaced by contingent charges, payable only out of earnings as provided in the Plan of a maximum annual amount of approximately \$553,000.

#### Treatment of Security Holders

With the fixed interest charges drastically reduced, and the interest on the new Income Mortgage Bonds being deferred until April 1, 1936, and payment of interest thereafter being contingent on earnings, it is felt that existing working capital will be sufficient without calling on the stockholders for an assessment to provide additional funds. A present assessment under existing circumstances in many cases would impose a severe hardship on the stockholders, and might in some cases result in wiping out their interest in the property.

Under the Plan, the Industrial Bondholders are to receive for each \$1,000 principal amount of Bonds (together with the unpaid interest thereon which amounted to 10% to February 1, 1935): (a) \$400 principal amount of new 5% Income Mortgage Bonds and (b) 20 shares of new Common Stock. The Industrial Bondholders are to receive all of the new Income Mortgage Bonds and all of the new Common Stock of the new Company to be presently issued in the reorganization. The entire issue of Industrial Bonds outstanding in the aggregate principal amount of \$27,633,000 is in default. Interest on the Industrial Bonds accrued and unpaid to February 1, 1935 amounts to \$2,763,300. Accordingly, in the first instance, the Plan gives to the holders of the Industrial Bonds the entire ownership and control of the New Company, subject to \$4,500,000 of Fuel Bonds which are undisturbed in the reorganization.

The Plan, however, does not in its effect on stockholders operate as a strict foreclosure, since the stockholders are to receive Warrants entitling them at their option to purchase, at any time until February 1, 1950, a stock equity in the New Company at \$35 per share. The price at which stockholders, under the terms of such Warrants, may regain an equity position in the enter-

prise, takes into consideration the basis upon which the Industrial Bondholders are to receive shares in the new Common Stock in exchange for that part of their debt not covered by new Income Mortgage Bonds.

In the relative treatment of the Preferred and Common Stockholders, recognition has been given to the fact that, while the Preferred Stock (of which only 20,000 shares are outstanding) has a cumulative priority over the Common Stock in the distribution of earnings, it has no priority in distribution of assets on liquidation. The Preferred Stockholders, therefore, are accorded the right to purchase for each share of present Preferred Stock held a substantially larger proportion of the equity of the New Company than the Common Stockholders.

Under the Plan, Preferred Stockholders are to receive, for each share of Preferred Stock, Warrants to purchase 3 shares of new Common Stock, and Common Stockholders are to receive, for each share of present Common Stock, Warrants to purchase  $\frac{3}{4}$  of a share of new Common Stock.

Although the number of shares of Common Stock of the New Company will be greater than the number of shares of the present Common Stock now outstanding, the amount of senior securities will be materially reduced. As indicated above, the total interest charges, both fixed and contingent, ranking ahead of the new Common Stock will be less than half the present fixed interest charges, and, moreover, there will be no preferred stock. In addition, all cash proceeds of the exercise of Warrants are dedicated to the retirement of Income Mortgage Bonds, and Income Mortgage Bonds may be tendered at their principal amount in payment of the warrant subscription price. Accordingly it may be expected that, when all the Warrants to be issued under the Plan are exercised, practically the entire issue of Income Mortgage Bonds will be retired.

#### Provision for Future Financial Requirements

A sound plan of reorganization must provide a financing medium for the possible future financial requirements of the New Company. In this connection, it must be recognized that many of the operating properties of the Present Company, although capable of economic operation, are old, and consideration must be given to the possible necessity of modernizing equip-

ment, as well as to the possible need for more working capital at some time in the future.

To provide a financing medium for such requirements, the Plan provides for the creation at some future time by the New Company of an issue of First and Refunding Mortgage Bonds, which will rank ahead of the Income Mortgage Bonds. These First and Refunding Mortgage Bonds may be authorized in a maximum amount not exceeding \$15,000,000, of which \$4,500,000, or such lesser amount as shall be required for the purpose, will be reserved to acquire or refund the Fuel Bonds. The balance may be issued, when authorized by the vote of two-thirds in number of the entire Board of Directors, for such purposes and under such restrictions as may be expressed in the First and Refunding Mortgage. *It is not proposed to issue any First and Refunding Mortgage Bonds in the reorganization.*

#### Effect of Plan

The effect of the Plan is:

First: To strengthen the capital structure of the enterprise, through the drastic reduction of fixed charges and the provision of a financing medium for future financial requirements.

Second: To give full recognition to the paramount rights of the bondholders.

Third: To enable the stockholders to regain an interest in the enterprise upon a basis which takes account of the present junior rank of the stockholders and of the relative rights and priorities of the two classes of stock.

The plan will be consummated only in accordance with the provisions of Section 77B of the Bankruptcy Act. The new securities provided for in the Plan will be issued only when the Plan has been confirmed by the United States District Court for the District of Colorado in accordance with the provisions of said Section. The Plan will not be carried out unless and until it has been accepted by or on behalf of the holders of two-thirds in amount of the Industrial Bonds and the holders of a majority of the Preferred Stock and a majority of the Common Stock of the Present Company.



## Plan

## I. Capitalization (as of March 1, 1935) of Present Company

The Colorado Fuel and Iron Company General Mortgage 5% Bonds, due February 1, 1943 (hereinafter called the Fuel Bonds) \$4,500,000<sup>1</sup>

The Colorado Industrial Company First Mortgage 5% Bonds, due August 1, 1934 (hereinafter called the Industrial Bonds) 27,633,000<sup>2</sup>

8% Cumulative Preferred Stock (\$100 par value) ..... 20,000 shares<sup>3</sup>

Common Stock (without par value) ..... 340,505 shares

## II. Securities Affected by the Plan

The following securities of the Present Company are affected by the Plan:

Industrial Bonds;  
8% Cumulative Preferred Stock;  
Common Stock.

The following securities and claims are *not* affected by the Plan:

Fuel Bonds which are to be assumed by the New Company as stated in paragraph 1 of Article IV below;

The various claims referred to in paragraph 2 of Article IV below.

## III. Capitalization of New Company

A new corporation (hereinafter called the New Company) is to be organized under the laws of such State as may be determined as hereinafter in Article IX provided to acquire directly or otherwise all of the assets of the Present Company and the In-

<sup>1</sup>Exclusive of \$599,000 of Fuel Bonds deposited with the Industrial Commission of Colorado to secure payments under the Workmen's Compensation Act. The amount of Fuel Bonds outstanding is subject to reduction through the operation of the sinking fund for such bonds.

<sup>2</sup>Exclusive of \$7,741,000 of Industrial Bonds owned by the Present Company.

<sup>3</sup>Dividends have not been paid since November 25, 1931. The Preferred Stock is entitled to cumulative dividends at the rate of 8% per annum and no more payable out of the net earnings before any dividends are paid on the Common Stock, but ranks equally with the Common Stock in the distribution of assets on liquidation.



Industrial Company, as the same shall exist upon the consummation of the Plan and subject to such changes therein in the meantime as shall result from the ordinary conduct of the business by the Trustee or as shall be authorized by the Court, subject, however, (but only in so far as the same attaches thereto) to the lien of the Present Company's General Mortgage dated February 1, 1893, and the supplements thereto, securing the Fuel Bonds. The New Company will have the following capitalization:

|  |                             |
|--|-----------------------------|
| Fuel Bonds (undisturbed in the reorganization) | \$ 4,500,000 <sup>1</sup>   |
| Income Mortgage Bonds                          | 11,053,200 <sup>2</sup>     |
| Common Stock (1,000,000 shares authorized)     | 552,660 shares <sup>3</sup> |
| Warrants to purchase Common Stock              | 315,379 shares              |

#### IV. Treatment of Existing Debt and Stocks Under Plan<sup>4</sup>

##### 1. Fuel Bonds

The Fuel Bonds are not affected by the Plan. They are to remain undisturbed in the reorganization and are to be assumed by the New Company. The interest on the Fuel Bonds maturing August 1, 1933, and February 1, 1934, which was not paid when due, has been subsequently paid by the Receiver pursuant to order of the Court, and pursuant to like order the interest on the Fuel Bonds maturing August 1, 1934 and February 1, 1935, was paid when due. It is contemplated by the Plan that interest on the Fuel Bonds hereafter maturing will be paid by the Trustee until the consummation of the Plan and thereafter by the New Company.

##### 2. Other Claims

The following claims are not affected by the Plan. To the extent that such claims have not been paid by the Receiver or shall

<sup>1</sup>Exclusive of \$599,000 of Fuel Bonds deposited with the Industrial Commission of Colorado to secure payments under the Workmen's Compensation Act. The amount of Fuel Bonds outstanding is subject to reduction through the operation of the sinking fund for such bonds.

<sup>2</sup>May be subordinated to an issue of First and Refunding Mortgage Bonds hereinafter described.

<sup>3</sup>The new Common Stock will be without par value or have such par value as the Reorganization Managers shall determine as hereinafter in Article IX provided.

<sup>4</sup>The capital stock of the Industrial Company and \$7,741,000 principal amount of Industrial Bonds, which are owned by the Present Company, will be cancelled in the reorganization.

not be paid by the Trustee pursuant to order of Court, they are to be paid in cash by the New Company upon the consummation of the Plan or assumed by the New Company:<sup>1</sup>

Any claims of the United States of America or of the State of Colorado<sup>2</sup>;

Workmen's Compensation claims;

Obligations of the Receiver and of the Trustee;

Obligations to Subsidiaries;

Current liabilities incurred in the ordinary conduct of the business of the Present Company prior to receivership<sup>3</sup>; and

Claims, as adjusted or liquidated and allowed by the Court, arising from the disaffirmance of contracts by the Receiver or the Trustee.

All of the known claims against the Present Company arising prior to receivership are included within the categories listed above. Other liabilities, liens or encumbrances, if any, in respect of which claims are hereafter filed or evidenced in accordance with orders of the Court, may be adjusted or compromised and dealt with or paid or discharged by the New Company, or the property may be transferred to the New Company subject to any such liens or encumbrances, all as may be determined in Article IX provided.

### 3. Industrial Bonds

The holders of Industrial Bonds are to receive for each \$1,000 principal amount of Bonds (together with the unpaid interest thereon, which amounted to 10% to February 1, 1935):

(a) \$400 principal amount of new 5% Income Mortgage Bonds; and

(b) 20 shares of Common Stock of the New Company.

<sup>1</sup>There are no known claims against the Industrial Company other than the Industrial Bonds.

<sup>2</sup>Up to December 31, 1934, the United States has asserted a claim for \$37,016.85 in respect of additional income taxes for previous years.

<sup>3</sup>The greater part of such claims, so far as known, have been paid by the Receiver pursuant to order of Court and there remain unpaid and to be liquidated known claims asserted up to December 31, 1934 for an aggregate of \$9,518.88.

Coupons appurtenant to the Industrial Bonds maturing on or before February 1, 1933, which have not heretofore been paid, will be paid in full in cash. The aggregate face amount of such coupons is \$2,375.

#### 4. Preferred Stock

Holders of Preferred Stock are to receive for each share of such stock:

Warrants to purchase, at any time on or before February 1, 1950, 3 shares of Common Stock of the New Company at \$35 per share.

#### 5. Common Stock

Holders of Common Stock are to receive for each share of such stock:

Warrants to purchase, at any time on or before February 1, 1950,  $\frac{3}{4}$  of a share of Common Stock of the New Company at \$35 per share.

#### V. Executory Contracts Made or Adopted by the Receiver and Trustee

The New Company will be deemed to have assumed such of the contracts of the Present Company which are executory in whole or in part, including executory leases, as shall have been affirmed or adopted by the Receiver or the Trustee prior to the date of confirmation of the Plan, and also any executory contracts of the Receiver and the Trustee, which, by their terms, do not terminate at the conclusion of the receivership or reorganization proceedings.

#### VI. Description of New Securities

##### 1. Income Mortgage Bonds

The new 5% Income Mortgage Bonds will be dated April 1, 1935, will mature April 1, 1970, and will be redeemable (as a whole or, if no cumulative interest on the Bonds shall be in arrears, in part, or, whether or not cumulative interest on the Bonds shall be in arrears, out of the cash proceeds of the Warrants as hereinafter provided) on any interest date at the principal amount thereof together with all unpaid cumulative interest. The Income Mortgage Bonds will not bear interest for the period prior to April 1, 1936; interest for each of the years end-

ing March 31, 1937 and March 31, 1938 is to be payable only to the extent earned in the preceding calendar year and only as and when declared by the Board of Directors in its discretion, but such interest to the extent so earned shall be cumulative; interest accruing from April 1, 1938 is to be fully cumulative at the rate of 5% per annum and will be required to be declared and paid to the extent earned; provided, however, that no interest shall be required to be declared due and payable upon the Income Mortgage Bonds to an amount greater than the amount by which the consolidated net current assets of the New Company and subsidiary companies as of the December 31st next preceding the declaration of such interest, exceeded the sum of \$5,000,000. The term "subsidiary companies" as used herein shall mean companies 90% or more of whose capital stock entitled to vote for the election of directors shall be owned by the New Company. All un-raid cumulative interest shall be payable in any event at the maturity of the bonds. No dividends shall be paid on any class of stock prior to April 1, 1936, and no such dividends shall be paid thereafter unless all arrears of interest and interest payable during the current year shall have been declared payable on the bonds as required by the Income Mortgage. There is annexed hereto as Exhibit C (page 13) a statement of the provisions to be contained in the Income Mortgage with reference to the payment of interest on the Income Mortgage Bonds and the determination of net income available therefor. Such determination of available net income shall be made annually for the preceding calendar year, and any interest accruing on the bonds shall, if declared, be payable on the April 1, or on the April 1 and October 1, following such determination, all as more fully set forth in Exhibit C.

The Income Mortgage Bonds will be authorized in the amount of \$11,053,200, all of which are to be presently issued in respect of the outstanding Industrial Bonds. The Income Mortgage Bonds will be issued under a mortgage and deed of trust, which will constitute (a) a lien, subject to the lien of the mortgage securing the Fuel Bonds so far as the same attaches, on the fixed properties, except as provided below, or securities of subsidiary companies owning fixed properties, acquired by the New Company in the reorganization, and (b) a lien on all fixed operating properties, or securities of subsidiary companies owning such properties, thereafter acquired by the New Company. It is intended that certain real estate of substantial extent not essential to operations and certain other properties no longer profitably employed



in the operations of the Présent Company will be disposed of as rapidly as possible, either before or after the completion of the reorganization, and may be set apart until disposed of (either in a separate subsidiary company or otherwise), and neither such properties nor the securities of any company owning the same shall be included among the fixed properties of the New Company to be mortgaged. Said properties and securities to be excluded from the lien of the Income Mortgage shall be determined as hereinafter in Article IX provided. The Income Mortgage will contain provisions permitting the modification of any of the terms thereof (other than any change in the principal amount, maturity date or interest rate of the bonds, or in the provisions governing the payment of interest) with the consent of the holders of not less than 85% in principal amount of the Income Mortgage Bonds at the time outstanding; and will also contain provisions permitting releases of mortgaged property, acceleration of the maturity of the bonds after an event of default, etc.

As hereinafter provided in paragraph 3(a) of this Article VI, Income Mortgage Bonds with all unmatured coupons may be tendered at the principal amount of such bonds, flat, in lieu of cash in payment of the subscription price for shares of Common Stock of the New Company upon exercise of the Warrants described herein.

The Income Mortgage will also contain provisions permitting the subordination of the lien thereof to the lien of a mortgage to secure an issue of not exceeding \$15,000,000 First and Refunding Mortgage Bonds, referred to below, which may hereafter be created by the New Company.

## 2. Common Stock

The Common Stock of the New Company, which will be without par value or have such par value as the Reorganization Managers shall determine as hereinafter in Article IX provided, is to be authorized in the amount of 1,000,000 shares, of which 552,660 shares will be presently issued to the holders of the Industrial Bonds as provided in the Plan. 315,379 shares will be reserved to provide for the Warrants issued pursuant to the Plan. The balance will be reserved for issue for corporate purposes of the New Company.



### 3. Warrants

Warrants will be authorized for the purchase of a total of 315,379 shares of Common Stock of the New Company at \$35 per share. All Warrants issued under the Plan shall be identical, and may be exercised at any time and from time to time on or before February 1, 1950.

The Warrants or the agreement under which the Warrants are issued will provide that in case of the consolidation or merger of the New Company or the sale of its property as an entirety or substantially as an entirety, the Warrants shall continue in full force and effect in respect of whatever securities may be issued in such consolidation, merger or sale in exchange for Common Stock of the New Company, and will contain provisions for the adjustment in certain cases of the warrant price and of the number of shares of Common Stock purchasable under the Warrants. There is annexed hereto marked Exhibit D (page 17) a statement of such provisions.

Warrants for the purchase of fractional shares of Common Stock of the New Company will not be issued, but in lieu thereof scrip will be issued which will be exchangeable, in amounts aggregating full shares, for Warrants for full shares. Such fractional scrip will be issued in such form and on such terms and with such date or dates of expiration, not earlier than December 31, 1940, as may be determined as hereinafter in Article IX provided.

It will be further provided in respect of the Warrants:

(a) *Tender of Bonds.* In payment of the subscription price for shares of the Common Stock of the New Company upon exercise of the Warrants, the holders thereof may tender, in lieu of cash, Income Mortgage Bonds with all unmatured coupons at the principal amount of such Income Mortgage Bonds, flat.

(b) *Application of Proceeds of Warrants.* The cash proceeds of the Warrants shall be applied to the purchase, on calls for tenders, of Income Mortgage Bonds at prices not exceeding the principal amount thereof together with any unpaid cumulative interest thereon, or, to the extent that such purchases cannot be made, to the redemption by lot of Income Mortgage Bonds at the principal amount thereof together with any unpaid cumulative interest thereon.

All Income Mortgage Bonds so tendered in payment of the subscription price upon the exercise of the Warrants, or so purchased or redeemed with the proceeds of the Warrants, shall be cancelled and no Income Mortgage Bonds shall be issued in lieu thereof.

4. First and Refunding Mortgage Bonds (none to be presently issued)

The Income Mortgage and the Certificate of Incorporation of the New Company will contain provisions permitting the creation at some future time by the New Company, by resolution of its Board of Directors, of an issue of First and Refunding Mortgage Bonds which will be secured by a lien prior to the lien of the Income Mortgage on the property then covered thereby and on after-acquired property to the extent determined by the Board of Directors of the New Company and stated in the First and Refunding Mortgage. A vote of the stockholders of the New Company will be taken in the course of the reorganization proceedings authorizing the Board of Directors to create such First and Refunding Mortgage at some future time. The First and Refunding Mortgage Bonds may be authorized in an amount not exceeding \$15,000,000, of which \$4,000,000, or such lesser amount as may be required for the purpose, will be reserved to acquire or refund the Fuel Bonds. The balance may be issued when authorized by resolution concurred in by two-thirds in number of the entire Board of Directors of the New Company, for such purposes and under such restrictions as may be expressed in the First and Refunding Mortgage. The First and Refunding Mortgage Bonds may be issued in series and each series may have such maturity dates, interest rates, redemption prices, conversion and stock purchase privileges, sinking fund and other provisions as shall be determined by the Board of Directors of the New Company. *No First and Refunding Mortgage Bonds are to be issued in the reorganization.*

## VII. Management

The New Company will have a Board of Directors of nine members. The first Board of Directors will consist of the following:

Arthur Roeder, Denver, Colorado

S. G. Pierson, Denver, Colorado

Bertram Cutler, Madison, New Jersey

Cyril J. C. Quinn, New York City

John Evans, Denver, Colorado

Carl J. Schmidlapp, Mill Neck, New York

Fred Farrar, Denver, Colorado

W. A. Maxwell, Jr., Denver, Colorado

J. F. Welborn, Denver, Colorado

In case any of the above named persons shall be unable to serve for any reason, their places will be filled by persons designated by the Industrial Committee, with the approval of the Reorganization Managers.

## VIII. Method of Acceptance of the Plan

The method by which creditors, stockholders and other parties in interest may evidence their acceptance of the Plan, and, after confirmation by the Court in the reorganization proceedings, may participate therein, will be as determined by the Court by order or orders entered in the reorganization proceedings, and notice thereof will be given to the creditors, stockholders and other parties in interest in accordance with Article XI hereof or as required by such order or orders of the Court.

## IX. Supervision and Consummation of Plan

Messrs. J. & W. Seligman & Co., as Reorganization Managers, shall have general supervision over the consummation of the Plan subject to the approval of the Court. The form and terms of the certificate of incorporation and by-laws of the New Company, the Income Mortgage and the Income Mortgage Bonds, the Common Stock, the Warrants and any other documents used in connection with the reorganization, and the steps to be taken to carry out the Plan, shall, in all respects not expressly defined in the Plan, be determined, subject to the approval of the Court, by the Reorganization Managers with the approval of the Industrial Committee and the Stockholders Committee. Messrs. J. & W. Seligman & Co. shall act as a co-partnership and in case of any change in said firm any successor firm as from time to time con-

stituted shall continue to act as Reorganization Managers with all the powers of the Reorganization Managers hereunder. If the Reorganization Managers at any time acting hereunder should resign or otherwise be unable to act, said two Committees, with the approval of the Court, may appoint a successor or successors who shall have all the powers of Reorganization Managers hereunder. Either of said Committees may act by a majority of its members, and such action may be taken at a meeting or in writing without a meeting. Any member of either of said Committees may in writing authorize any person to act in his place for any and all purposes. A written instrument signed by a majority of the members of either Committee, or the certificate of the Chairman or Secretary of such Committee as to any action taken by them, shall be sufficient evidence thereof for the purposes of the Plan.

The new securities may be delivered in the first instance in temporary form, exchangeable for definitive securities when prepared.

The Plan will be consummated only in accordance with the provisions of Section 77B of the Bankruptcy Act. The new securities provided for in the Plan will be issued only when the Plan has been confirmed by the United States District Court for the District of Colorado in accordance with the provisions of said Section. The Plan will not be carried out unless and until it has been accepted by or on behalf of holders of two-thirds in amount of the Industrial Bonds and the holders of a majority of the Preferred Stock and a majority of the Common Stock of the Present Company.

#### X. Reorganization Expenses

All expenses of reorganization and all costs of administration and other allowances made by the Court shall be paid in cash by the Trustee or the New Company, subject to the provisions of Section 77B of the Bankruptcy Act. Without limiting the generality of the foregoing, such expenses, costs and allowances shall include reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the reorganization proceedings and the prior receivership proceedings and the preparation and consummation of the Plan by officers, parties in interest, the Reorganization Managers and the Committees and other representatives of cred-



itors or stockholders, and the attorneys or agents of any of the foregoing and of the Present Company, as shall be determined or approved by the Court in the reorganization proceedings. The New Company will hold harmless and defend the directors and officers of the Present Company and the New Company, the Reorganization Managers, the Committees and the Trustee against all liability and expense arising from their acts in good faith under the Plan or in connection therewith. All amounts to be paid by the Trustee or the New Company under the Plan for services or expenses incident to the reorganization shall be subject to the approval of the Court.

It is proposed that, subject to the approval of the Court, the Reorganization Managers shall be entitled to receive \$175,000 as compensation for their services as Reorganization Managers.

#### XI. Notices Under the Plan

Unless otherwise provided in Section 77B of the Bankruptcy Act or in any order or orders of the Court, whenever notice shall be required or permitted to be given under or pursuant to the Plan, such notice shall be given by publishing a copy of such notice once in each week for two successive weeks in a newspaper of general circulation in Denver and in a newspaper of general circulation in the Borough of Manhattan, City of New York, and also (1) in case of notice to the holders of Industrial Bonds and stockholders who shall have accepted the Plan, by mailing such notice postage prepaid to the addresses of such bondholders and stockholders set forth in the acceptances signed by them; and (2) in case of notices to the holders of Industrial Bonds and stockholders who shall not have accepted the Plan, by mailing such notice postage prepaid to such bondholders and stockholders whose names and addresses appear on the books of the Present Company or of the Trustee.

#### XII. Statements Contained in the Plan

The statements, opinions, computations, estimates, conclusions, etc., contained in the Introductory Statement, the Plan, and the Exhibits of the Plan (1) are submitted by the Present Company and are not made by or joined in by the Trustee or by any of the Committees or by the Reorganization Managers; (2) are made solely for the purpose of assisting the Court (after hearing) in the reorganization proceedings, and creditors, stockholders and other parties in interest, in making a determination as to the



fairness of the Plan; and (3) are not intended for the use or information of prospective purchasers of any securities referred to in the Plan whether now existing or proposed to be issued, or for any purpose other than the purpose stated in (2); and no one is authorized to make any statement regarding the Plan, whether with reference to any securities referred to therein or otherwise, which is not set forth herein.

The Reorganization Managers and the Committees in acting hereunder offer their services to the holders of the securities of the Present Company in an endeavor to carry out the reorganization in accordance with the Plan and subject to the supervision of the Court, but neither the Reorganization Managers nor the Committees assume any personal liability in connection with carrying out the Plan either in respect of the new securities or otherwise except to exercise good faith in such endeavor. Each bondholder and stockholder accepting the Plan does so with the understanding as set forth above and with the further understanding that the Reorganization Managers and the respective Committees are acting solely as agents of himself and of other security holders in an endeavor to carry out the reorganization in accordance with this Plan, and, as such agents, shall have only the powers and duties expressly conferred by the Plan. The Plan describes in general outline the character of the new securities which it is proposed the New Company will issue, and the method of effecting the reorganization, the precise terms and conditions of which are necessarily to be determined in accordance with the powers granted by the Plan, and under the supervision of the Court, to fit the facts and circumstances as they may exist from time to time during the reorganization.

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**EXHIBIT A**  
**THE COLORADO FUEL AND IRON COMPANY**  
**AND SUBSIDIARY COMPANIES**

The following statement of profit and loss and surplus has been prepared from the published annual reports of the Present Company for the years 1926 to 1932 (for which years the consolidated accounts were certified and from information furnished by the Trustee for the years 1933 and 1934. The statement is furnished solely as a matter of historical record, and inasmuch as the results shown below have been taken from previously of the Trustee, it should be understood that no adjustments have been made to profit and loss or surplus as between years in respect of the matters referred to in the footnotes.

**COMPARATIVE STATEMENT OF PROFIT AND LOSS AND SURPLUS (Including Capital Surplus)**  
**FOR THE CALENDAR YEARS 1926 TO 1934, INCLUSIVE**

| Particulars   | 1926                             | 1927            | 1928            | 1929            | 1930             | 1931                   | 1932                   |
|---|----------------------------------|-----------------|-----------------|-----------------|------------------|------------------------|------------------------|
| Profit or loss, before deducting provision for depreciation and depletion, interest on funded debt, and provision for Federal income taxes <sup>(1)</sup> | \$ 6,792,980.47                  | \$ 6,601,186.64 | \$ 4,863,377.24 | \$ 6,378,874.43 | \$ 3,929,959.36  | \$ 236,457.44 (loss)   | \$ 1,242,744.17 (loss) |
| Deduct:   |                                  |                 |                 |                 |                  |                        |                        |
| Provision for depreciation and depletion <sup>(2)</sup>   | 1,860,274.19                     | 2,012,885.48    | 2,105,907.00    | 2,130,778.47    | 1,970,915.82     | 1,473,724.24           | 1,387,148.40           |
| Balance   | \$ 4,932,706.28                  | \$ 4,588,301.16 | \$ 2,757,470.24 | \$ 4,248,095.96 | \$ 1,959,043.54  | \$ 1,710,178.68 (loss) | \$ 2,629,892.57 (loss) |
| Deduct:   |                                  |                 |                 |                 |                  |                        |                        |
| Interest on funded debt <sup>(3)</sup>  | \$ 1,807,551.06                  | \$ 1,715,597.44 | \$ 1,673,096.79 | \$ 1,628,188.28 | \$ 1,624,074.49  | \$ 1,626,530.05        | \$ 1,611,368.62        |
| Provision for Federal income taxes, including adjustments for prior years   | 376,740.81                       | 295,184.83      | 73,454.22       | 269,859.68      | 36,320.46        | 26,497.96              | 12,000.00              |
| Together  | \$ 2,184,291.87                  | \$ 2,010,782.27 | \$ 1,746,551.01 | \$ 1,898,047.96 | \$ 1,660,394.95  | \$ 1,653,028.01        | \$ 1,623,368.62        |
| Profit or loss, before credits and charges shown below  | \$ 2,748,414.41                  | \$ 2,577,518.89 | \$ 1,010,919.23 | \$ 2,350,048.00 | \$ 298,648.59    | \$ 3,363,206.69 (loss) | \$ 4,253,261.19 (loss) |
| Surplus adjustments:  |                                  |                 |                 |                 |                  |                        |                        |
| Undepreciated value of equipment dismantled <sup>(2)</sup>  | \$ 548,163.42*                   | \$ 471,827.16*  | \$ 234,875.39*  | \$ 409,396.70*  | \$ 440,077.57*   | \$ 918,306.34*         | \$ 661,370.41*         |
| Transfers from contingent and operating reserves  |                                  |                 |                 | 704,337.03      |                  |                        |                        |
| Write off ore development expenses  |                                  |                 |                 | 551,659.65*     |                  |                        |                        |
| Additional provision workmen's compensation   |                                  |                 |                 |                 |                  |                        |                        |
| Capital surplus created through reduction of capital stock in the amount of \$25,537,875, less adjustment of property values, etc.                        |                                  |                 |                 | 8,619,256.92    |                  |                        |                        |
| Dividends paid on:  |                                  |                 |                 |                 |                  |                        |                        |
| Preferred stock   | 160,000.00*                      | 160,000.00*     | 160,000.00*     | 160,000.00*     | 160,000.00*      | 120,000.00*            |                        |
| Common stock  |                                  |                 |                 |                 | 595,817.25*      | 85,116.75*             |                        |
| Together  | \$ 708,163.42*                   | \$ 631,827.16*  | \$ 394,875.39*  | \$ 416,719.32*  | \$ 7,423,362.10  | \$ 1,123,423.09*       | \$ 661,370.41*         |
| Net additions to or deductions from surplus   | \$ 2,040,250.99                  | \$ 1,945,691.73 | \$ 616,043.84   | \$ 1,933,328.68 | \$ 7,722,010.69  | \$ 4,486,629.78*       | \$ 4,914,631.60*       |
| Surplus or deficit at beginning of year   | 146,882.92 <sup>(4)</sup> (def.) | 1,893,368.07    | 3,839,059.80    | 4,455,103.64    | 6,388,432.32     | 14,110,443.01          | 9,623,813.23           |
| Surplus at end of year  | \$ 1,893,368.07                  | \$ 3,839,059.80 | \$ 4,455,103.64 | \$ 6,388,432.32 | \$ 14,110,443.01 | \$ 9,623,813.23        | \$ 4,709,181.63        |

**NOTES—**

\*All deductions are shown in italics.

<sup>(1)</sup>No adjustment has been made to profit and loss as between years to reflect certain changes made during the period in the method of computing cost of sales or for various overlapping charges which have been deducted on the books.

<sup>(2)</sup>Provisions for depreciation and depletion and losses on retirements were affected by appraisal adjustments made during the period, and the profit and loss figures for the individual years have not been adjusted for.

<sup>(3)</sup>Interest charges did not include any amortization of bond discount and expense which had been previously charged to surplus as at January 1, 1926.

<sup>(4)</sup>Interest on the Industrial Bonds has not been accrued subsequent to July 31, 1933. If such interest had been accrued, interest on funded debt for 1933 would have been increased by \$575,687.50 and for 1934 by \$1,381,000.00. Adjustments, correspondingly increased and the surplus correspondingly decreased for those years.

<sup>(5)</sup>After miscellaneous adjustments as at January 1, 1926, reclassification of property accounts including increases in values to offset bond discount and expense then written off, etc.

<sup>(6)</sup>On August 1, 1933, a Receiver was appointed for the properties of the Present Company. On August 1, 1934, a Trustee was appointed for the estate of the Present Company under Section 77B of the Bankruptcy Act and was still in possession of such estate.



**EXHIBIT A**  
**THE COLORADO FUEL AND IRON COMPANY**  
**AND SUBSIDIARY COMPANIES**

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the published annual reports of the Present Company for the years 1926 to 1932 (for which years the consolidated accounts were certified by Messrs. Price, Waterhouse & Co.) statement is furnished solely as a matter of historical record, and inasmuch as the results shown below have been taken from previously published annual reports and the accounts and loss or surplus as between years in respect of the matters referred to in the footnotes.

**STATEMENT OF PROFIT AND LOSS AND SURPLUS (Including Capital Surplus)**

**FOR THE CALENDAR YEARS 1926 TO 1934, INCLUSIVE**

|        | 1928            | 1929            | 1930            | 1931                   | 1932                   | 1933                                  | 1934                                |
|--------|-----------------|-----------------|-----------------|------------------------|------------------------|---------------------------------------|-------------------------------------|
| 86.64  | \$ 4,863,377.24 | \$ 6,378,874.43 | \$ 3,929,959.36 | \$ 236,457.44 (loss)   | \$ 1,242,744.17 (loss) | \$ 5,518.35                           | \$ 1,343,354.63                     |
| 85.48  | 2,105,907.00    | 2,130,778.47    | 1,970,915.82    | 1,473,721.24           | 1,387,148.40           | 1,429,805.82                          | 1,358,378.86                        |
| 81.16  | \$ 2,757,470.24 | \$ 4,248,095.96 | \$ 1,959,043.54 | \$ 1,710,178.68 (loss) | \$ 2,629,892.57 (loss) | \$ 1,424,287.47 (loss)                | \$ 15,024.20 (loss)                 |
| 77.44  | \$ 1,673,096.79 | \$ 1,628,188.28 | \$ 1,624,074.49 | \$ 1,626,530.05        | \$ 1,611,368.62        | \$ 1,033,812.29 <sup>(1)</sup>        | \$ 225,504.17 <sup>(1)</sup>        |
| 74.83  | 73,454.22       | 269,859.68      | 36,320.46       | 26,497.96              | 12,000.00              | 37,929.05                             | 1,011.15                            |
| 72.27  | \$ 1,746,551.01 | \$ 1,898,047.96 | \$ 1,660,394.95 | \$ 1,653,028.01        | \$ 1,623,368.62        | \$ 1,071,741.34                       | \$ 226,515.32                       |
| 68.89  | \$ 1,010,919.23 | \$ 2,350,048.00 | \$ 298,648.59   | \$ 3,363,206.69 (loss) | \$ 4,253,261.19 (loss) | \$ 2,496,028.81 <sup>(1)</sup> (loss) | \$ 241,539.52 <sup>(1)</sup> (loss) |
| 67.16* | \$ 234,875.39*  | \$ 409,396.70*  | \$ 440,077.57*  | \$ 918,306.34*         | \$ 661,370.41*         | \$ 110,126.40*                        | \$ 45,738.58*                       |
|        |                 | 704,337.03      |                 |                        |                        | 150,000.00                            |                                     |
|        |                 | 551,659.65*     |                 |                        |                        | 120,000.00*                           |                                     |
|        |                 | 8,619,256.92    |                 |                        |                        |                                       |                                     |
| 60.00* | 160,000.00*     | 160,000.00*     | 160,000.00*     | 120,000.00*            |                        |                                       |                                     |
|        |                 |                 | 595,817.25*     | 85,116.75*             |                        |                                       |                                     |
| 57.16* | \$ 394,875.39*  | \$ 416,719.39*  | \$ 7,423,362.10 | \$ 1,123,423.09*       | \$ 661,370.41*         | \$ 80,126.40*                         | \$ 45,738.58*                       |
| 51.73  | \$ 616,043.84   | \$ 1,933,328.68 | \$ 7,722,010.60 | \$ 4,486,629.78*       | \$ 4,914,631.60*       | \$ 2,576,155.21*                      | \$ 287,278.10*                      |
| 43.07  | 3,839,059.80    | 4,455,103.64    | 6,388,432.32    | 14,110,443.01          | 9,623,813.23           | 4,709,181.63                          | 2,133,026.42 <sup>(1)</sup>         |
| 38.80  | \$ 4,455,103.64 | \$ 6,388,432.32 | \$14,110,443.01 | \$ 9,623,813.23        | \$ 4,709,181.63        | \$ 2,133,026.42 <sup>(1)</sup>        | \$ 1,845,748.32 <sup>(1)</sup>      |

main changes made during the period in the method of computing cost of sales or for various overlapping charges which have been deducted in the year in which the entry was

by appraisal adjustments made during the period, and the profit and loss figures for the individual years have not been adjusted for subsequent write-offs or surplus charges which had been previously charged to surplus as at January 1, 1926.

If such interest had been accrued, interest on funded debt for 1933 would have been increased by \$575,687.50 and for 1934 by \$1,381,650, and the losses, before surplus adjustments, for these years,

by accounts including increases in values to offset bond discount and expense then written off, etc.

Company. On August 1, 1934, a Trustee was appointed for the estate of the Present Company under Section 77B of the Bankruptcy Act and such Trustee at December 31, 1934,

## EXHIBIT B.

**THE COLORADO FUEL AND IRON COMPANY  
AND SUBSIDIARY COMPANIES**  
**CONSOLIDATED BALANCE SHEET AS AT DECEMBER 31, 1934**  
 (Prepared by the Trustee†)

**ASSETS****CURRENT ASSETS:**

|   |                        |
|---|------------------------|
| Cash in banks and on hand   | \$ 8,636,629.38        |
| Notes and accounts receivable:  |                        |
| Customers   | \$ 1,306,534.90        |
| Others  | 236,323.92             |
|   | <u>\$ 1,542,858.82</u> |
| Deduct—Reserves   | 559,984.41             |
|   | <u>982,874.41</u>      |
| Warrants of States and political subdivisions thereof, at face values | 54,007.73              |
| Inventories, valued at not more than the lower of cost or market      | 3,546,856.78           |
|   | <u>\$ 8,220,368.30</u> |

**MISCELLANEOUS INVESTMENTS**

31,128.00

**PROPERTY ACCOUNTS, AT BOOK VALUES, which do not purport to represent realizable values nor sound values at existing price levels:**

|   |                        |
|---|------------------------|
| Land, mineral reserves and water rights | \$14,763,709.43        |
| Less—Reserves for depletion             | 498,093.40             |
|   | <u>\$14,265,616.03</u> |
| Buildings, machinery and equipment      | \$46,188,380.38        |
| Less—Reserves for depreciation          | 21,990,937.99          |
|   | <u>24,197,442.39</u>   |

38,463,058.42

**PATENTS, TRADE-MARKS AND GOODWILL**

1.00

**DEFERRED CHARGES**

110,754.38

\$46,825,310.10
**LIABILITIES****CURRENT LIABILITIES:**

|   |           |
|---|-----------|
| Accounts payable  |           |
| Accrued liabilities:  |           |
| Salaries and wages  | \$ 179.53 |
| Taxes, other than income taxes                                  | 535.80    |
| Interest to December 31, 1934, on the Fuel Bonds <sup>(1)</sup> | 93.75     |

Reserve for Federal income taxes of prior years  
 Reserve for workmen's compensation payable (of which it is estimated that \$60,000 is payable in 1935)

**FUNDED DEBT:**

|                                      |                    |
|--------------------------------------|--------------------|
| Fuel Bonds <sup>(2)</sup> :          |                    |
| Authorized                           | \$ 6,000.00        |
| Issued                               | \$ 5,994.00        |
| Redeemable and cancelled             | 895.00             |
|                                      | <u>\$ 5,099.00</u> |
| Less—Held in treasury <sup>(3)</sup> | 599.00             |

**Industrial Bonds (now in default) <sup>(4)</sup>:**

|                                      |                    |
|--------------------------------------|--------------------|
| Authorized                           | \$45,000.00        |
| Issued                               | \$39,000.00        |
| Redeemable and cancelled             | 3,626.00           |
|                                      | <u>\$35,374.00</u> |
| Less—Held in Treasury <sup>(5)</sup> | 7,741.00           |

Add—Interest on the Industrial Bonds from February 1,  
 to July 31, 1933<sup>(4)</sup>

**Total liabilities****EXCESS OF BOOK VALUE OF ASSETS OVER LIABILITIES****Represented by:**

Preferred Stock—8% cumulative, \$100 par—20,000 shares<sup>(3)</sup>  
 Common Stock of no par value—340,505 shares

**NOTES:**

<sup>(1)</sup>Interest on the Fuel Bonds has been accrued to December 31, 1934.

<sup>(2)</sup>Sinking fund requirements for the Fuel Bonds have been satisfied for the year ended June 30, 1934; but the sinking fund requirements for the Industrial Bonds have not been met since July 1, 1932.

<sup>(3)</sup>At December 31, 1934, of the treasury bonds shown above \$599,000 of Fuel Bonds and \$663,000 of Industrial Bonds were deposited with the Industrial Commission of Colorado to secure payments under the Workmen's Compensation Act. On January 31, 1934, the Trustee has purchased \$100,000 of Government bonds at a cost of approximately \$105,000 and deposited them with the Industrial Commission of Colorado in place of said Industrial Bonds, which are now held by the Industrial Commission of Colorado.

<sup>(4)</sup>Interest on the Industrial Bonds has been accrued from February 1, 1933, the date of the last interest payment, to July 31, 1933. The interest from August 1, 1933, to December 31, 1934, which has not been accrued, is included in the liability for interest on the Industrial Bonds.

<sup>(5)</sup>Dividends have not been paid on the Preferred Stock since November 25, 1931.

Certain shares, bonds and a note of subsidiary companies are pledged as collateral under the indenture securing the Industrial Bonds.

†On August 1, 1933, a Receiver was appointed for the properties of the Present Company. On August 1, 1934, a Trustee was appointed for the estate of the Present Company under Section 77B of the Bankruptcy Act, 1934, and was still in possession of such estate.



## EXHIBIT B.

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**THE COLORADO FUEL AND IRON COMPANY  
AND SUBSIDIARY COMPANIES  
CONSOLIDATED BALANCE SHEET AS AT DECEMBER 31, 1934  
(Prepared by the Trustee†)**

\$ 3,636,629.38

982,874.41  
54,007.73  
3,546,856.78

---

\$ 8,220,368.30

31,128.00

at realizable val-

\$14,265,616.03

24,197,442.39

---

38,463,058.42  
1.00

---

110,754.38

---

\$46,825,310.10

---

**LIABILITIES**

|  |                 |                 |
|--|-----------------|-----------------|
| <b>CURRENT LIABILITIES:</b>  |                 |                 |
| Accounts payable   |                 | \$ 574,293.78   |
| <b>Accrued liabilities:</b>  |                 |                 |
| Salaries and wages   | \$ 179,531.76   |                 |
| Taxes, other than income taxes   | 535,808.70      |                 |
| Interest to December 31, 1934, on the Fuel Bonds <sup>(1)</sup>  | 92,750.00       |                 |
|  |                 | 809,090.46      |
| Reserve for Federal income taxes of prior years  |                 | 41,011.15       |
| Reserve for workmen's compensation payable (of which it is estimated that \$60,000 is payable in 1935) |                 | 218,716.39      |
|  |                 | \$ 1,643,111.78 |
| <b>FUNDED DEBT:</b>  |                 |                 |
| Fuel Bonds <sup>(2)</sup> :  |                 |                 |
| Authorized   | \$ 6,000,000.00 |                 |
| Issued   | \$ 5,994,000.00 |                 |
| Redeemable and cancelled   | 895,000.00      |                 |
|  | \$ 5,099,000.00 |                 |
| Less—Held in treasury <sup>(3)</sup>   | 599,000.00      |                 |
|  |                 | \$ 4,500,000.00 |
| Industrial Bonds (now in default) <sup>(2)</sup> :   |                 |                 |
| Authorized   | \$45,000,000.00 |                 |
| Issued   | \$39,000,000.00 |                 |
| Redeemable and cancelled   | 3,626,000.00    |                 |
|  | \$35,374,000.00 |                 |
| Less—Held in Treasury <sup>(3)</sup>   | 7,741,000.00    |                 |
|  |                 | 27,633,000.00   |
|  |                 | \$32,133,000.00 |
| Add—Interest on the Industrial Bonds from February 1, 1933 to July 31, 1933 <sup>(4)</sup>             |                 | 690,825.00      |
|  |                 | 32,823,825.00   |
| Total liabilities  |                 | \$34,466,936.78 |
| <b>EXCESS OF BOOK VALUE OF ASSETS OVER LIABILITIES</b>   |                 | 12,358,373.32   |
| <b>Represented by:</b>   |                 |                 |
| Preferred Stock—8% cumulative, \$100 par—20,000 shares <sup>(5)</sup>                                  |                 |                 |
| Common Stock of no par value—340,505 shares  |                 |                 |
|  |                 | \$46,825,310.10 |

year ended June 30, 1934; but the sinking fund requirements for the Industrial Bonds have not been met since July 1, 1932. Bonds and \$663,000 of Industrial Bonds were deposited with the Industrial Commission of Colorado to secure payments under the Workmen's Compensation Act. Since December 31, 1933, approximately \$105,000 and deposited them with the Industrial Commission of Colorado in place of said Industrial Bonds, which are now held in the treasury. The date of the last interest payment, to July 31, 1933. The interest from August 1, 1933, to December 31, 1934, which has not been accrued, would amount to \$1,957,337.50.

† Under the indenture securing the Industrial Bonds, the Trustee was appointed for the estate of the Present Company under Section 77B of the Bankruptcy Act and such Trustee at December 31, 1934.

**Exhibit C.**

The provisions to be contained in the Income Mortgage with reference to the payment of interest on the Income Mortgage Bonds and the determination of net income available therefor shall be in substantially the following form.

(The New Company mentioned in the foregoing Plan is referred to in the following provisions as "the Company", the Income Mortgage Bonds as "the Bonds", the Income Mortgage as "this Indenture" and the Trustee under the Income Mortgage as "the Trustee").

**Article****Payment of Interest.**

Section 1. The Bonds shall bear no interest for the period prior to April 1, 1936. Commencing April 1, 1936 the Bonds will bear interest, subject to the provisions of this Article , at the rate of 5% per annum. Except as hereinafter in this Article provided, no interest shall become due and payable on any of the Bonds until the principal of such Bonds shall become due and payable, whether at the maturity thereof, on call for redemption, by declaration or otherwise.

Section 2. Interest on the Bonds for the year ending March 31, 1937, shall be payable only to the extent that the available net income of the Company, as hereinafter defined, for the calendar year 1936 shall be sufficient to pay such interest, and shall be payable only as and when the Board of Directors of the Company in its sole and unrestricted discretion shall declare the same to be due and payable as hereinafter provided, but such interest, to the extent so earned, shall be cumulative and shall be payable in any event when the principal of the Bonds shall become due and payable. Interest on the Bonds for the year ending March 31, 1938, shall be payable only to the extent that the available net income of the Company, as hereinafter defined, for the calendar year 1937 shall be sufficient to pay such interest, and shall be payable only as and when the Board of Directors of the Company in its sole and unrestricted discretion shall declare the same to be due and payable as hereinafter provided, but such interest, to the extent so earned, shall be cumulative and shall be payable in any event when the principal of the Bonds shall become due and payable.

If the available net income of the Company for the calendar year 1936 shall not be sufficient to pay interest on the Bonds for the year ending March 31, 1937, or if the available net income of the Company for the calendar year 1937 shall not be sufficient to pay interest on the Bonds for the year ending March 31, 1938, at the full rate of 5% per annum, then the interest on the Bonds for such year or years, to the extent not so earned, whether the deficiency shall be total or partial, shall not thereafter be payable either when the principal of the Bonds shall become due and payable or prior thereto, and whether or not the Company shall have surplus available net income in any subsequent year or years.

Interest on the Bonds accruing from April 1, 1938 shall be fully cumulative, whether or not the available net income of the Company in any calendar year shall be sufficient to pay such interest, that is to say, if interest on the Bonds at the full rate of 5% per annum from April 1, 1938, shall not have become due and payable as hereinafter provided, the deficiency shall accumulate and, subject to the provisions of Section 9 and Section 10 of this Article, shall be declared due and payable by the Board of Directors of the Company as hereinafter provided whenever the available net income of the Company shall be sufficient to pay such interest or any part thereof, and in any event when the principal of the Bonds shall become due and payable. Subject to the provisions of Section 9 and Section 10 of this Article, the Board of Directors shall apply, to the extent necessary, all of the available net income of the Company for each calendar year, commencing with the calendar year 1938, to the payment as hereinafter provided on April 1 and October 1 of the year following such calendar year of any unpaid interest on the Bonds accrued from April 1, 1938 to the October 1 of the year following such calendar year.

The expression "unpaid cumulative interest" or similar expression whenever used in this Indenture shall be deemed to mean interest on the Bonds at the rate of 5% per annum from April 1, 1938 to date, to the extent that such interest shall not have been previously paid, plus any interest on the Bonds for the years ending March 31, 1937 and March 31, 1938, to the extent (but not exceeding the rate of 5% per annum) that such interest shall have been earned in the calendar years 1936 and 1937 respectively, and shall not have been previously paid.



Accumulations of interest shall not bear interest.

Section 3. On or before March 15, 1937, the Board of Directors of the Company shall determine the amount, if any, of the available net income of the Company for the calendar year 1936, and shall declare to be due and payable on April 1, 1937, such sum, if any, in respect of interest on the Bonds for the year ending March 31, 1937, as the Board of Directors of the Company in its sole and unrestricted discretion shall determine, not exceeding interest at the rate of 5% per annum, and not exceeding the amount of the available net income of the Company for the calendar year 1936.

On or before March 15, 1938, the Board of Directors of the Company shall determine the amount, if any, of the available net income of the Company for the calendar year 1937, and shall declare to be due and payable on April 1, 1938, such sum, if any, in respect of interest on the Bonds for the year ending March 31, 1938, as the Board of Directors of the Company in its sole and unrestricted discretion shall determine, not exceeding interest at the rate of 5% per annum, and not exceeding the amount of the available net income of the Company for the calendar year 1937.

On or before March 15, 1939, and on or before March 15 in each year thereafter to and including March 15, 1969, the Board of Directors of the Company shall determine the amount, if any, of the available net income of the Company for the preceding calendar year and, subject to the provisions of Section 9 and Section 10 of this Article, shall declare to be due and payable on the next succeeding April 1 such sum, if any, as such available net income shall suffice to pay in respect of interest on the Bonds not theretofore paid from April 1, 1938 to such next succeeding April 1, not exceeding interest for said period at the rate of 5% per annum, and shall declare to be due and payable on the next succeeding October 1 such sum, if any, as the balance of such available net income shall suffice to pay in respect of interest on the Bonds to accrue from such next succeeding April 1 to such next succeeding October 1, not exceeding interest for said period at the rate of 5% per annum.

If the Board of Directors of the Company shall, on or before March 15, 1939, or on or before March 15 in any year thereafter, declare to be due and payable on the next succeed-



ing April 1 and October 1 as aforesaid all interest on the Bonds not theretofore paid from April 1, 1938 to the next succeeding April 1 and October 1, respectively, at the rate of 5% per annum, the Board of Directors of the Company may in its sole and unrestricted discretion also declare to be due and payable on the next succeeding April 1 or October 1 or on both such dates such part of any unpaid cumulative interest in respect of the years ending March 31, 1937 and March 31, 1938, as the Board of Directors shall determine.

Section 4: Within ten (10) days after March 15 of each year, the Company shall file with the Trustee an income statement specifying the amount of the available net income, if any, of the Company for the preceding calendar year, specifying the basis or method of ascertaining the same, and specifying further the amount, if any, declared by the Board of Directors of the Company to be due and payable in respect of interest on the Bonds on the next succeeding April 1, or on the next succeeding April 1 and October 1. Each such statement to be filed with the Trustee shall be accompanied by (1) a certificate, in form satisfactory to the Trustee, of certified public accountants satisfactory to the Trustee, who may be the accountants regularly employed by the Company to audit its accounts, that such statement is correct and prepared in accordance with the provisions of this Indenture, and (2) a certified copy of the resolution of the Board of Directors of the Company with reference to the determination of such available net income and declaration of interest. The Trustee shall be under no duty or obligation with respect to any such statement or certificate except to keep the same on file and available for inspection by holders of Bonds during usual business hours.

Section 5. Whenever any interest on the Bonds shall have been declared by the Board of Directors of the Company to be due and payable on any April 1 or October 1 as above provided, such interest shall become due and payable on the date on which it is so declared to be due and payable.

Section 6. Whenever the principal of any of the Bonds shall become due and payable, whether at maturity, upon call for redemption, by declaration or otherwise, all unpaid cumulative interest thereon to the date when such principal shall become due and payable shall, without any declaration by the

Board of Directors of the Company, become due and payable and the Company covenants and agrees that it will pay the full amount of all such unpaid cumulative interest together with the principal of such Bonds.

Section 7. The respective coupons attached to the Bonds shall be expressed to be payable on April 1, 1937, on April 1, 1938, and on April 1 and October 1 of each year thereafter beginning with April 1, 1939 and including April 1, 1970. Each coupon maturing prior to April 1, 1970, shall be an obligation of the Company to pay the amount of interest, if any, becoming due and payable on its date as hereinbefore provided. The coupon maturing April 1, 1970 appurtenant to any of the Bonds, and in the event that, by reason of any provision of this Indenture, the principal of any of the Bonds shall become due and payable upon some interest payment date prior to April 1, 1970, the coupon maturing on such interest payment date appurtenant to such Bonds, shall be an obligation of the Company to pay all unpaid cumulative interest on such Bonds to April 1, 1970, or, as the case may be, to the date when the principal of such Bonds shall become due and payable. In the event that by reason of any provision of this Indenture the principal of any of the Bonds shall become due and payable prior to the maturity thereof upon any date not an interest payment date the coupon next maturing after such date shall be an obligation of the Company to pay all of the unpaid cumulative interest on such Bonds to the date when the principal of such Bonds shall have become due and payable.

Interest on the coupon Bonds shall be payable only upon presentation and surrender of the several coupons annexed thereto as such coupons respectively become due and payable as herein provided; and when and as paid all coupons shall forthwith be cancelled. Coupons expressed to be payable on a date on which no interest shall be declared to be due and payable as herein provided shall after the payment date thereof be null and void.

Section 8. The available net income of the Company for any calendar year, as such term is used in this Article , shall be the consolidated net income for such calendar year of the Company and subsidiary companies, as hereinafter defined, computed and ascertained as follows: From the gross revenues of the Company and its subsidiary companies (including non-

operating income, but excluding any gains from the sale of capital assets or from the purchase or acquisition of outstanding securities at less than their face amount or stated value), there shall be deducted all operating and non-operating expenses of the Company and its subsidiary companies, including therein reasonable and proper charges for current repairs and current maintenance of their plants and properties, rentals, license charges, taxes, workmen's compensation and any and all other charges now or hereafter required to be made or paid by law, insurance, reasonable and proper charges for depreciation and depletion, interest charges upon all indebtedness of the Company and its subsidiary companies (excepting interest on the Bonds), and also all other charges against income including such charges and reserves for obsolescence and any other purposes as the Board of Directors of the Company in its discretion shall deem necessary and proper. For the purposes of this Section 8, charges for current repairs shall include provision for all such renewals as under good accounting practice are chargeable to expense, irrespective of when the expenditures for such renewals are actually made; and there shall not be included in charges for current repairs in any year any expenditures for renewals in respect of which provision shall have been made by charges to expense in previous years. In making such computation of consolidated net income, all intercorporate transactions shall be eliminated and appropriate deductions and adjustments shall be made in respect of shares of stock of any subsidiary company which are not owned by the Company or another subsidiary company, all in accordance with good accounting practice. No deduction shall be made for losses sustained by the Company or any of its subsidiary companies from the sale of capital assets. No deduction shall be made for taxes which are imposed on income or profits after the deduction of interest, except to the extent that such taxes are payable by subsidiary companies which, under the pertinent law and regulations, shall file separate returns and pay such taxes on the basis of such separate returns.

For the purpose of this Article , the term "subsidiary company" shall be deemed to mean a corporation ninety per cent. or more of whose outstanding capital stock entitled to vote for the election of directors shall at the time be held, directly or indirectly, by the Company, or by any one or more subsidiaries of the Company, or by the Company and one or

more subsidiaries of the Company. The term "capital assets" as used in this Section 8 shall be deemed to mean all assets except current assets as hereinabove defined.

Section 9. Anything in this Indenture to the contrary notwithstanding, interest shall not be required to be declared due and payable upon the Bonds, until the principal of such Bonds shall become due and payable (whether at maturity thereof, on call for redemption, by declaration or otherwise), to an amount greater than the amount by which the consolidated net current assets of the Company and its subsidiary companies, as of the December 31st next preceding the declaration of such interest, exceeded the sum of \$5,000,000.

The term "current assets" of the Company and its subsidiary companies as used in this Section 9 shall be deemed to mean (a) cash on hand and in banks, excluding any cash required to be applied to the retirement of the Bonds; (b) good current accounts and bills and notes receivable acquired in the ordinary course of business; (c) raw material (not including ore or coal, except such as have been actually mined and shall then be on the surface at the mines available for shipment or in transit, or at works) and material in process of manufacture, and manufactured products, such material and products being taken at the cost thereof, without interest, if the cost be below market value, but at market value, if that be below cost; (d) readily marketable securities including in such term shares of stock (other than securities issued or assumed by the Company or by any subsidiary company), taken at the cost or market value thereof, whichever is lower; and (e) any other items which are properly classified as "current assets" in accordance with sound accounting practice. In computing current assets for the purposes of this Section 9 there shall not be included any assets which are pledged or deposited as security for any obligation which is not a current liability as said term is hereinafter defined, but there shall be included assets of the character aforesaid which are pledged or deposited as security for or for the purpose of paying current liabilities. The term "current liabilities" of the Company and its subsidiary companies as used in this Section 9 shall be deemed to mean all liabilities, whether or not due, of the Company and its subsidiaries or secured by lien upon property of the Company or its subsidiary companies, except liabilities in respect



of interest which shall not have been declared due and payable on the Bonds and except such liabilities as are not payable within the succeeding twelve months, but including all amounts payable within the succeeding twelve months in respect of any sinking fund or analogous funds for any indebtedness not due within the succeeding 12 months, and for any stocks or other securities of the Company or its subsidiary companies. For the purposes of this Section 9, current liabilities shall include liabilities arising from indorsements or guaranties of current liabilities as well as actual current liabilities. In computing contingent liabilities because of indorsements or guaranties credit shall be allowed as a contingent asset up to the amount of such liabilities for any surplus of the current assets of the corporation primarily liable upon or which issued the obligations indorsed or guaranteed, over and above the current liabilities of such corporation other than the indorsed or guaranteed obligation. For the purposes of this Section 9, the determination of current assets and current liabilities shall be on the basis of a consolidated balance sheet of the Company and its subsidiaries, with inter-company items eliminated. The term "consolidated net current assets" of the Company and its subsidiary companies shall mean the excess of consolidated current assets over consolidated current liabilities.

Whenever the Board of Directors of the Company shall determine the amount of the consolidated net current assets of the Company and its subsidiary companies for the purpose of this Section 9, and a firm of certified public accountants satisfactory to the Trustee, who may be the accountants regularly employed by the Company to audit its accounts, shall certify that in their opinion such determination is fair and correct, then such determination shall be final and conclusive for all purposes of this Section 9. A copy of such audit so certified by such accountants, accompanied by a certified copy of the resolutions of the Board of Directors with reference to the determination of the consolidated net current assets of the Company and its subsidiary companies for the purposes of this Section 9, shall be filed with the Trustee on or before March 25 of each year. The Trustee shall be under no duty or obligation with respect to any such audit or certificate except to keep the same on file and available for inspection by holders of Bonds during usual business hours.

Any available net income of the Company for any calendar year commencing with the calendar year 1938 which shall not be applied to the payment of interest on the Bonds because of the provisions of this Section 9 shall be carried forward and be added to the gross revenues of the Company for the ensuing year.

Section 10. Interest on the Bonds will be required to be paid in any calendar year only in amounts equal to  $\frac{1}{4}$  of 1% of the principal amount of Bonds, or in multiples thereof. Smaller fractional amounts of available net income for any calendar year commencing with the calendar year 1938 shall be carried forward and be added to the gross revenues of the Company for the ensuing year.

Section 11. The Company will not pay any dividends on any class of stock of the Company prior to April 1, 1936, and will not pay any such dividends in the year ending March 31, 1937, or in the year ending March 31, 1938; unless interest on the Bonds at the rate of 5% per annum for such year shall have been declared to be due and payable on the succeeding April 1 and the money to pay such interest shall have been set apart. No dividends on any class of stock of the Company shall be paid in any calendar year, commencing with the calendar year 1938, unless there shall previously have been declared due and payable; and money set aside for the payment of, all interest on the Bonds for the years ending March 31, 1937, and March 31, 1938, to the extent that such interest shall have been earned in the calendar years 1936 and 1937, respectively, and, commencing with the calendar year 1939, also all interest on the Bonds at the rate of 5% per annum from April 1, 1938 to the October 1 in the calendar year in which such dividend shall be declared.

Section 12. No interest shall accrue or be payable upon any instalment of interest on the Bonds, or upon the coupons therefor, unless or until the Company shall have made default in paying the same, or some part thereof, upon demand on or after the date when such instalment shall have become due and payable as herein provided, and in that event such interest thereon shall accrue only from the date of such default at the rate of five per cent. per annum.

Section 13. Anything in this Indenture to the contrary not-

withstanding, the Board of Directors of the Company shall be entitled, in its sole and unrestricted discretion (but subject to the provisions of the last paragraph of Section 3 of this Article ), to declare to be due and payable and to cause to be paid any unpaid cumulative interest on the Bonds, whether or not there shall be available net income of the Company applicable to the payment of such interest; provided that the Board of Directors shall not declare any such unpaid cumulative interest to be due and payable, except out of available net income of the Company applicable thereto, unless there shall have been filed with the Trustee a certificate dated not more than ninety days prior to such declaration, signed by an independent engineer or firm of engineers or engineering corporation selected by the Company and acceptable to the Trustee, stating in his, their or its opinion that, at the date of said certificate, the mortgaged properties (other than those whose operation the Board of Directors of the Company, by resolution, shall have decided to discontinue, either temporarily or permanently) are being adequately maintained and are in good repair and in reasonably adequate working order according to the usual practice of companies conducting similar operations.

Section 14. Whenever any interest shall become due and payable by the Company under the provisions of this Indenture, the Company shall cause notice of the date of such payment and the amount thereof to be published in a newspaper of general circulation in Denver and in a newspaper of general circulation in the Borough of Manhattan, City of New York, at least once prior to such date of payment; but, neither this requirement to publish such notice nor the fact that such publication may not be made before the day on which such interest shall be due and payable in accordance with the provisions of this Indenture shall postpone the date on which such payment is required, under the provisions hereof, to be made.

Section 15. In case the Company shall be consolidated with or merged into any other corporation, or in case the property of the Company as an entirety, or substantially as an entirety, shall be sold to some other corporation, the corporation formed by such consolidation or into which the Company shall have become merged, or which shall have purchased the property of the Company as an entirety, or substantially as an entirety, shall, as a part of such consolidation or merger, or as a part

of the purchase price in case of any such sale, expressly assume the due and punctual payment of the principal of the Bonds and, as a fixed charge payable semi-annually on April 1 and October 1, interest at the rate of 5% per annum on the Bonds from the April 1 or October 1 next preceding the date of such consolidation, merger or sale, and shall agree to pay within three years after the date of such consolidation, merger or sale all unpaid cumulative interest on the Bonds, if any, up to the April 1 or October 1 next preceding the date of such consolidation, merger or sale.

#### Exhibit D.

The Warrants issued pursuant to the foregoing Plan shall be subject to substantially the following terms and conditions, which shall be set forth in the Warrants or in the Agreement under which the Warrants are issued.

(The New Company mentioned in the Plan is referred to in the following provisions as the "Company".)

A. The term "warrant price" wherever used herein shall mean the price per share at which shares of the Common Stock of the Company shall, at the time, be purchasable under any Warrant, determined as hereinafter provided. The term "Common Stock" wherever used herein shall mean not only the 1,000,000 shares of Common Stock of the Company authorized by its Certificate of Incorporation at the date of the Warrants, but also the shares of stock of any class hereafter authorized which shall not be limited to a fixed sum or percentage in respect to the right of the holders thereof to participate in dividends, or in the distribution of assets upon a voluntary or involuntary liquidation, dissolution or winding up of the Company.

B. The warrant price from and after the issuance of the Warrants, unless and until adjusted as hereinafter provided, shall be \$35 per share. Except in accordance with the provisions of Paragraph C (3) below, the warrant price shall never exceed \$35 per share and, having been reduced at any time or from time to time by adjustment as herein provided, shall never thereafter, except in accordance with the provisions of said Paragraph C (3) below, be increased above the amount to which so reduced, notwithstanding the subsequent issue of



shares of Common Stock at a price exceeding such reduced warrant price.

C. For the purpose of this Paragraph C, the term "additional shares" shall mean all shares of Common Stock (in addition to the 552,660 shares to be outstanding at the date of the Warrants) hereafter issued or sold from time to time, whether at a price equal to or above or below the warrant price then in effect. If and whenever, prior to the exercise or expiration of all purchase rights represented by any Warrants at any time outstanding, the Company shall issue or sell any "additional shares" at a price less than the warrant price in effect immediately prior to such issue or sale, the warrant price shall thereupon be adjusted, and if more than one issue or sale shall be made successively adjusted, as follows: the adjusted warrant price shall be determined by multiplying 552,660 by the Base Price (the term Base Price for the purposes hereof being deemed to mean \$35 unless and until reduced pursuant to Paragraph D below, and when so reduced, the term Base Price shall mean such reduced price), and adding to the product thereby obtained a sum equal to the aggregate amount of money in dollars, or the fair value in dollars of the property or other consideration, if any, received by the Company upon the issue of all "additional shares" then or at any time therefore issued, and dividing the resulting total by a divisor consisting of 552,660 increased by the number of all such "additional shares", and the resulting quotient shall be the adjusted warrant price per share. Upon each such adjustment of the warrant price, the holder of each Warrant shall thereafter be entitled, instead of purchasing the number of shares specified in his Warrant at the price of \$35 per share, to purchase at the adjusted warrant price per share the number of shares calculated to the nearest one-hundredth of a share, obtained by multiplying the Base Price by the number of shares stated to be purchasable on the face of his Warrant and dividing the product so obtained by the adjusted warrant price per share.

For the purpose of this Paragraph C, the following provisions shall also be applicable:®

(1) Except as hereinafter in this sub-paragraph (1) provided, shares of Common Stock issued as a stock dividend shall be treated as "additional shares" but shall be deemed to have been issued without consideration. If at any time the

Company shall declare a cash dividend on any of the Common Stock and shall contemporaneously or within three months after the date of payment of such dividend give to the holders thereof the right to subscribe for additional Common Stock at a price which shall net the Company in the aggregate substantially the amount of such cash dividend so declared, such Common Stock so issued in respect of any such subscription shall be deemed to have been issued as a stock dividend. The provisions of this sub-paragraph (1) are subject to the following: In case of the issue of stock dividends in an amount not exceeding (taking any shares so issued at the warrant price in effect at the time of such issue) the aggregate amount of the earned surplus of the Company as hereinafter defined, the shares of Common Stock issued as such stock dividend shall be deemed to have been issued for a consideration equal to the warrant price in effect at the time of such issue, and, accordingly, no adjustment shall be made in the warrant price or in the number of shares purchasable under the Warrants in such case.

(2) In case the Company shall at any time issue in exchange for shares of its Common Stock theretofore issued and outstanding a larger number of shares of Common Stock, the excess number of shares of Common Stock so issued shall be treated as a stock dividend subject to all the provisions of the foregoing sub-paragraph (1) and Paragraph G below.

(3) In case the Company shall at any time issue in exchange for shares of its Common Stock theretofore issued and outstanding a smaller number of shares of Common Stock, the warrant price then in effect shall be increased and the number of shares of Common Stock purchasable under the Warrants shall be decreased correspondingly, and in all subsequent calculations under this Paragraph C there shall be subtracted from the divisor above mentioned a sum equal to the number of shares by which the issued and outstanding shares shall be reduced upon such exchange.

(4) In case the Company shall in any manner grant or offer any rights to subscribe for or to purchase Common Stock of the Company, or grant or offer any options for the purchase of its Common Stock, any adjustment required to be made in accordance with the provisions hereof in the warrant price and in the number of shares purchasable under the Warrants

on account of the issue of such Common Stock shall be made only as of the close of business on the day on which such subscription rights or options shall expire; provided, however, that if such subscription rights or options shall continue in effect for a longer period than six months from the date when the same were granted or offered, any such adjustment shall be made only as of the close of business June 30 and December 31 in each calendar year, in respect of the shares of Common Stock issued during the preceding six months upon the exercise of such rights or options, and as of the close of business on the day upon which such subscription rights or options shall expire, in respect of the shares of Common Stock so issued between the close of business on the preceding June 30 or December 31, as the case may be, and the close of business on the day upon which such subscription rights or options shall expire.

(5) In case the Company shall in any manner issue or sell obligations or stock convertible into or exchangeable for Common Stock of the Company, then all shares of Common Stock issued upon the conversion of or in exchange for such obligations or stock shall be deemed to be "additional shares", and the amount of money in dollars, or the fair value in dollars of the property or other consideration, if any, received by the Company in consideration for the issue or sale of such obligations or stock shall be deemed to be the consideration received for the issue or sale of such Common Stock; and any adjustment required to be made in accordance with the provisions hereof in the warrant price and in the number of shares purchasable under the Warrants by reason of the issue of such Common Stock shall be made only as of the close of business June 30 and December 31 in each calendar year, in respect of the shares of Common Stock issued during the preceding six months upon the conversion of or in exchange for such obligations or stock, and as of the close of business on the day upon which such right of conversion or exchange shall expire, in respect of the shares of Common Stock so issued between the close of business on the preceding June 30 or December 31, as the case may be, and the close of business on the day upon which such right of conversion or exchange shall expire.

(6) In determining the amount received by the Company upon the issue of "additional shares", such determination shall

be made without the deduction of any commission, discount or expenses paid for underwriting or marketing, or in connection with the sale thereof.

(7) In case the Company shall issue any "additional shares" for property or services, the value of such property or services shall, for the purposes hereof, be conclusively determined by the Board of Directors of the Company.

D. If and whenever, prior to the exercise or expiration of all purchase rights represented by any Warrants at any time issued, the Company shall pay any dividend of cash or assets or make any other distribution of cash or assets to the holders of its Common Stock in an amount exceeding the earned surplus of the Company as hereinafter defined at the time of the declaration of such dividend or distribution, the warrant price shall thereupon be reduced by the amount by which such dividend or other distribution paid upon one share of Common Stock exceeds the ratable portion of such earned surplus applicable to one share of Common Stock at the time of the payment of such dividend or other distribution; provided, however, that the number of shares of Common Stock purchasable under the Warrants shall not be changed by reason of such dividend or distribution. In case of any reduction of the warrant price pursuant to this Paragraph D, a similar reduction shall be made in the Base Price in all subsequent calculations. The value of any assets (other than cash) distributed to the holders of Common Stock shall, for the purposes of this Paragraph D, be conclusively determined by the Board of Directors of the Company.

E. If, at any time prior to the exercise or expiration of all purchase rights represented by any Warrants at any time issued, the Company shall be consolidated with or merged into any other corporation or corporations, or shall sell, for securities or partly for cash and partly for securities, all or substantially all of its property, assets, business and good-will, as an entirety, to another corporation or corporations, lawful provision shall be made, as part of the terms of any such consolidation, merger or sale, whereby the holder of each Warrant shall thereafter be entitled to purchase, in lieu of each share of the Common Stock of the Company otherwise purchasable upon the exercise of such Warrant, but at the warrant price in effect at the time of such consolidation, merger or sale (sub-



ject to reduction as hereinafter provided) the same kind and amount of securities (including in such term stock of any class or classes) as may be issuable or distributable upon such consolidation, merger or sale with respect to each share of Common Stock; provided, however, that the warrant price shall be reduced by the amount of any cash distributable or payable upon any such consolidation, merger or sale with respect to each share of Common Stock in excess of the ratable portion of the earned surplus of the Company as hereinafter defined at the time of such consolidation, merger or sale applicable to one share of Common Stock. Lawful provision having been so made, from and after such consolidation, merger or sale, all rights of the holders of Warrants shall cease and determine (including the right to purchase shares of the Common Stock and all rights with respect to further adjustments of the warrant price and the number of shares of Common Stock purchasable upon the exercise thereof) except the right to purchase during the life of the Warrants such securities as above provided as such securities may from time to time be constituted.

F. If the number of shares of Common Stock purchasable upon the exercise of the Warrants shall be required to be increased or decreased and the warrant price required to be adjusted, or securities other than shares of the Common Stock shall become purchasable in lieu of shares of the Common Stock upon exercise of the Warrants then, in each case, the Company shall forthwith

- (1) file with the Warrant Agent a certificate executed by the President or a Vice-President and attested by the Secretary or an Assistant Secretary of the Company, stating the increased or decreased number of shares of Common Stock, and the adjusted warrant price per share, or specifying the kind and amount of securities, so purchasable under the Warrants, and setting forth in reasonable detail the method of calculation and the facts (including the amount of money in dollars, or the fair value in dollars of the property or other consideration, if any, received or deemed to have been received for any "additional shares" or convertible securities) upon which such calculation is based; and

- (2) cause a notice stating the fact of such increase or decrease in the number of shares so purchasable and

the adjusted warrant price per share, or the fact that such kind and amount of securities are purchasable in lieu of each share of Common Stock, to be published at least once a week for two consecutive weeks in a newspaper of general circulation in Denver and in a newspaper of general circulation in the Borough of Manhattan, City of New York.

G. The term "earned surplus of the Company" as used herein shall be deemed to mean the aggregate amount of the consolidated net earnings and income of the Company and of its subsidiary companies from the organization of the Company to the date as of which the amount of its earned surplus shall be determined (after deducting, (a) interest, including interest on the outstanding Income Mortgage Bonds of the Company for the years ending March 31, 1937 and March 31, 1938, at the rate of not exceeding 5% per annum to the extent that such interest shall be earned in the calendar years 1936 and 1937, respectively, as provided in the Income Mortgage, and interest from April 1, 1938 at the rate of 5% per annum, (b) all losses and other proper charges against earnings and income, and (c) all dividends or other distributions of cash or assets to stockholders, including all stock dividends in respect of which no adjustment is to be made in respect of the warrant price or in the number of shares purchasable under the Warrants as hereinabove in Paragraph C (1) provided, any shares issued as such stock dividends to be taken for the purpose of such deduction at an amount equal to the warrant price in effect at the time such shares were issued), but excluding all stock dividends in respect of which an adjustment is to be made in respect of the warrant price or in the number of shares purchasable under the Warrants as hereinabove in Paragraph C provided, and excluding all dividends of cash or assets or other distributions of cash or assets to stockholders in respect of which an adjustment is to be made in respect of the warrant price as hereinabove in Paragraph D provided. The term "subsidiary company" shall mean any corporation, ninety per cent. or more of whose capital stock entitled to vote for the election of directors shall be owned by the Company, or by one or more of its subsidiary companies, or by the Company and one or more of its subsidiary companies.

H. In the event that a meeting of stockholders shall be

called to consider and take action on a proposal for the voluntary dissolution of the Company, other than in connection with a consolidation, merger or sale of all, or substantially all, of its property, assets, business and good will as an entirety, then and in that event the Company shall cause a notice thereof to be published at least once a week for two consecutive weeks in a newspaper of general circulation in Denver and in a newspaper of general circulation in the Borough of Manhattan, City of New York, such publication to be completed at least twenty days prior to the date fixed as a record date or the date of closing the transfer books for the determination of the stockholders entitled to vote at such meeting. If such notice shall have been so given and if such a voluntary dissolution shall be authorized at such meeting or any adjournment thereof, then from and after the date on which such voluntary dissolution shall have been duly authorized by the stockholders, the purchase rights represented by the Warrants and all other rights with respect thereto shall cease and determine.

Exhibit E.

In the District Court of the United States  
for the District of Colorado

In the Matter

of

The Colorado Fuel and Iron Company and Another, Colorado corporations,

Debtors.

In Proceedings for  
Reorganization.

Consolidated Cause  
No. 8081

Order on Proposal of Plan of Reorganization.

This cause coming on to be heard at this time pursuant to an order entered herein on March 12, 1935, and notice of this hearing having been given to the creditors and stockholders of The Colorado Fuel and Iron Company (hereinafter called the Present Company) and The Colorado Industrial Company (hereinafter called the Industrial Company) and other interested parties in the manner provided in said order, and the

Present Company and the Industrial Company having proposed the "Plan of Reorganization of The Colorado Fuel and Iron Company (and The Colorado Industrial Company) dated March 1, 1935" (hereinafter called the Plan), and the Court having considered the Plan and having heard the arguments of counsel and being fully advised in the premises, and good cause appearing therefor, it is

**Found, Adjudged and Decreed That**

**First:** The Plan complies with the provisions of subdivision (b) of Section 77B of the Bankruptcy Act, and has been duly proposed in accordance with the provisions of subdivision (d) of said Section 77B.

**Second:** Unless otherwise ordered by the Court, it shall not be requisite to the confirmation of the Plan that it be accepted (1) by the holders of the following claims (which are not affected by the Plan in that appropriate provision is made in the Plan either for the payment of such claims in cash in full or the assumption thereof by the new corporation to be organized in pursuance of the Plan, to the extent that such claims shall not have been paid):

(a) The Colorado Fuel and Iron Company General Mortgage 5% Bonds, due February 1, 1943, of which \$4,500,000 principal amount are outstanding in the hands of the public and \$599,000 principal amount are owned by the Present Company and are deposited with the Industrial Commission of Colorado to secure payments under the Colorado Workmen's Compensation Act;

(b) Claims of the United States of America and the State of Colorado;

(c) Workmen's Compensation claims;

(d) Obligations of Arthur Roeder as Receiver in the receivership proceeding entitled "Bankers Trust Company, Trustee, Complainant, vs. The Colorado Fuel and Iron Company, Defendant, in Equity No. 10179" or in the consolidated cause entitled "The New York Trust Company, as Trustee, Complainant, vs. The Colorado Fuel and Iron Company et al., Defendants, in Equity No. 10210" and as Trustee of the estates of the Debtor herein;



(e) Obligations of the Present Company to its subsidiaries;

(f) Current liabilities of the Present Company incurred in the ordinary conduct of its business prior to the appointment of said receiver for the Present Company on August 1, 1933; and

(g) Claims, as adjusted or liquidated and allowed by the Court, arising from the disaffirmance of contracts by Arthur Roeder as Receiver or Trustee as aforesaid;

or (2) by the holders of other liabilities, liens or encumbrances, if any (other than those referred to in paragraph Third of this order), in respect of which proofs of claims are filed in accordance with the order of this Court dated March 12, 1935 (which are not affected by the Plan in that the Plan provides that any such claims may be adjudged or compromised and dealt with or paid or discharged by the new corporation to be organized in pursuance of the Plan or that the property may be transferred to such new corporation subject to any such liens or encumbrances).

Third: For the purposes of the Plan and its acceptance, the creditors and stockholders of the Present Company and the Industrial Company whose claims and interests are affected by the Plan are the following who are hereby divided into the following classes according to the nature of their respective claims and interests:

Class I—The holders of The Colorado Industrial Company First Mortgage 5% Gold Bonds, due August 1, 1934 (hereinafter called the Industrial Bonds), which are guaranteed by the Present Company. \$27,633,000 principal amount of Industrial Bonds are outstanding in the hands of the public (exclusive of \$7,741,000 principal amount of Industrial Bonds which are owned by the Present Company and, together with all the capital stock of the Industrial Company which is also owned by the Present Company, are to be cancelled under the Plan in the reorganization);

Class II—The holders of the 8% Cumulative Preferred Stock (\$100 par value) of the Present Company (hereinafter called the Preferred Stock) of which 20,000 shares are outstanding in the hands of the public; and

**Class III**—The holders of the Common Stock without par value of the Present Company (hereinafter called the Common Stock) of which 340,505 shares are outstanding in the hands of the public.

**Fourth:** The claims and interests of the holders of the Industrial Bonds and of Preferred Stock and of Common Stock may be filed or evidenced, and when so filed or evidenced shall be deemed allowed, for the purpose of the acceptance of the Plan, and such holders of Industrial Bonds and Preferred Stock and Common Stock, as required by said Section 77B, may evidence their acceptance of the Plan, subject to the provisions of Paragraph Sixth of this order, in the following manner:

(a) In the case of holders of Industrial Bonds in registered form, by the filing herein of a written statement substantially in the form annexed hereto as Exhibit A, signed by the registered holder of such Bond or Bonds on the record date fixed as provided in paragraph Fifth below;

(b) In the case of holders of Industrial Bonds in bearer form, by the filing herein of a written statement substantially in the form annexed hereto as Exhibit B signed by the owner of such Bond or Bonds, accompanied by the certificate of any bank or trust company which is a member of the Federal Reserve System certifying that such Bond or Bonds are held by it for the account of such owner;

(c) In the case of holders of Preferred Stock, by the filing herein of a written statement substantially in the form annexed hereto as Exhibit C signed by the holders of record of such stock on the record date fixed as provided in paragraph Fifth below; and

(d) In the case of holders of Common Stock, by the filing herein of a written statement substantially in the form annexed hereto as Exhibit D signed by the holders of record of such stock on the record date fixed as provided in paragraph Fifth below.

Any written acceptance of the Plan shall be revocable up to the date of the hearing on confirmation of the Plan by filing written notice of such revocation with the Trustee, signed and acknowledged by the owner at the time of such revocation of

the bonds or stock in respect of which such acceptance was given.

**Fifth:** The close of business May 25, 1935 is hereby fixed as the record date for the determination of (a) the holders of Industrial Bonds in registered form and (b) the holders of the Preferred Stock and the holders of Common Stock of the Present Company for the purpose of the acceptance of the Plan and its confirmation by the Court, and the holders of registered Industrial Bonds and the holders of Preferred Stock and the holders of Common Stock on such record date, as evidenced by the bond registry and by the stock books of the Present Company shall, subject to the provisions of paragraph Sixth of this order, be deemed to be, respectively, the holders of such registered Industrial Bonds and the holders of Preferred Stock and the holders of Common Stock for the purpose of the acceptance of the Plan and of its confirmation by the Court.

**Sixth:** Notwithstanding the foregoing provisions of paragraphs Fourth and Fifth of this order,

(a) the claim of any holder of Industrial Bonds, whether or not registered in the name of such holder on the record date fixed as hereinabove provided, and whether or not a written acceptance of the Plan shall have theretofore been signed in respect of such bonds, may be filed, and when so filed shall be deemed allowed, for the purpose of the acceptance of the Plan or of being heard thereon, by the presentation to the Court at the hearing on confirmation of the Plan of such Bonds or of a certificate of any bank or trust company which is a member of the Federal Reserve System certifying that such bonds are held by it for the account of such holder, and in respect of any such bonds the action of such holder rather than the action of the registered holder on the record date or of the person who may theretofore have signed a written acceptance of the Plan shall govern for the purpose of acceptance of the Plan; and

(b) the interest of any stockholder, whether or not the registered holder on the record date fixed as hereinabove provided, and whether or not a written acceptance of the Plan shall have heretofore been signed in

respect of the stock held by him, may be evidenced, and when so evidenced shall be deemed allowed, for the purpose of acceptance of the Plan or of being heard thereon, by the presentation to the Court at the hearing on confirmation of the Plan of the certificates representing the stock held by him, and in respect of such stock the action of such holder rather than the action of the registered holder on the record date or of the person who may theretofore have signed a written acceptance of the Plan shall govern for the purpose of acceptance of the Plan.

Seventh: Said Trustee, the Present Company, the Industrial Company, the Reorganization Managers, the Industrial Committee, or the Stockholders Committee referred to in the Plan may apply to the Court at any time hereafter to fix a date for a hearing on the confirmation of the Plan, notice of such hearing to be given in accordance with Article XI of the Plan.

Eighth: The Plan shall be submitted to the creditors and stockholders of the Present Company and the Industrial Company for their consideration in the following manner:

(a) Said Trustee shall publish a notice substantially in the form annexed hereto marked Exhibit E once a week for two successive weeks in a newspaper of general circulation in Denver and in a newspaper of general circulation in the Borough of Manhattan, City of New York, the first publication to be not later than May 11, 1935; and such publication shall be good and sufficient notice to all creditors of the Present Company and the Industrial Company, all stockholders of the Present Company and other parties in interest of this order and of the proposal of the Plan as aforesaid.

(b) Said Trustee shall also on or before June 1, 1935 mail, or cause to be mailed, a copy of said notice, together with a copy of the Plan, postage prepaid, to each holder of Fuel Bonds and Industrial Bonds and each other creditor of the Present Company and of the Industrial Company, insofar as their respective addresses shall be known to said Trustee, and to each registered holder of Industrial Bonds and each record stockholder



of the Present Company appearing as such at the close of business on May 25, 1935, at their respective addresses as the same shall appear on the bond registry or the stock books of the Present Company, as the case may be; and from time to time thereafter and until otherwise ordered by the Court, the Trustee shall mail or cause to be mailed copies of said notice and the Plan to each person, who, subsequent to May 25, 1935, becomes a holder of record of registered Industrial Bonds or of stock of the Present Company. Said Trustee shall also mail or cause to be mailed, together with copies of the Plan as above directed, forms of acceptance of the Plan; substantially in the form annexed hereto as Exhibit A to holders of Industrial Bonds in registered form; substantially in the form annexed hereto as Exhibit B to holders of the Industrial Bonds in bearer form; substantially in the form annexed hereto as Exhibit C to holders of the Preferred Stock; and substantially in the form annexed hereto as Exhibit D to the holders of the Common Stock.

Ninth: Said Trustee shall pay the expenses of the publication, printing and mailing of the notice of this order hereinabove directed and also the cost of printing and mailing the Plan and the forms for its acceptance by creditors and stockholders affected thereby. Said Trustee shall also pay compensation to banks and trust companies certifying acceptances of the Plan signed by owners of Industrial Bonds in bearer form, at the following rates:

for receiving and redelivering bonds:

- (a) Blocks over \$1,000,000, 60¢ for each piece received;
- (b) Blocks over \$500,000 and up to \$1,000,000, 75¢ for each piece received;
- (c) Blocks over \$100,000 and up to \$500,000, \$1.00 for each piece received;
- (d) Blocks of \$100,000 and under, \$1.20 for each piece received.

plus any disbursements for postage and insurance incident to the shipment of securities.

Tenth: The Court reserves for final determination here-

after all questions with respect to whether the Plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible, and nothing contained in this order shall be deemed to prejudice the determination of any such questions. The Court also reserves for future determination all questions relating to the manner in which holders of securities affected by the plan may participate therein upon confirmation of the Plan by the Court, and all other questions relating to matters not expressly provided for in this order, as to which, under the Plan or said Section 77B, the approval or determination of the Court is required.

Dated, May 1st, 1935.

J. FOSTER SYMES,  
Judge.

Filed May 1, 1935, 5:40 P. M. Charles W. Bishop, Clerk.

**Exhibit F.**

**Exhibit A. In the District Court of the United States  
For the District of Colorado**

**Form of Acceptance for Bonds in Registered Form.**

(N. B. This white counterpart is to be forwarded immediately to J. & W. Seligman & Co., 54 Wall Street, New York City, in accordance with the instructions below.)

|   |   |   |
|---|---|---|
| <p>In the Matter<br/>of<br/>The Colorado Fuel and Iron Company and Another, Colorado corporations,<br/>Debtors.</p> | } | <p>Acceptance No.....<br/><br/>In Proceedings for Reorganization<br/><br/>Consolidated Cause No. 8081</p> |
|---|---|---|

**Approval and Acceptance of Plan of Reorganization.**

The undersigned, the registered owner of \$..... principal amount of First Mortgage 5% Gold Bonds of The Colorado Industrial Company (guaranteed by The Colorado Fuel and Iron Company), bearing the following serial numbers:

Hereby Accepts and Approves the "Plan of Reorganization of The Colorado Fuel and Iron Company (and The Colorado Industrial Company) dated March 1, 1935" heretofore proposed in the above proceedings, a copy of which Plan has been received by the undersigned, And Authorizes Messrs. J. & W. Seligman & Co., the Reorganization Managers named in said Plan, on behalf of the undersigned in accordance with Article XII of said Plan, to file this acceptance with the Court at such time as said Reorganization Managers shall in their discretion determine and to carry said Plan into effect subject to the provisions of Section 77B of the Bankruptcy Act.

In Witness Whereof, the undersigned has executed this instrument this            day of            , 1935.

Signature Guaranteed:

(Sign here) ..... [L. S.]  
(signature of owner)

.....  
(name of bank, trust company or New York Stock Exchange firm)

.....  
(Please also print or typewrite owner's name appearing above and address)

by .....  
(official title)

#### Instructions.

This form of acceptance is for use by holders of bonds in Registered Form. It should be filled in and signed in Duplicate.

The Original (white copy) of this form of acceptance of the Plan should be forwarded to Messrs. J. & W. Seligman & Co., the Reorganization Managers named in the Plan, 54 Wall Street, New York, N. Y.

The Duplicate counterpart (green copy) is to be retained by the bondholder.

The signature of the bondholder executing the acceptance must correspond with the name in which the bonds are registered in every particular without alteration or enlargement,

or any change whatever, and must be guaranteed by a New York bank or trust company, or by a bank or trust company having a New York office or correspondent, or by a firm having a membership in the New York Stock Exchange.

If such form of acceptance is executed by a trustee, attorney, executor, administrator, guardian, officer of a corporation or any other person acting in any other representative character, proper evidence of the authority of such person to act must accompany the acceptance.

Note: This form of acceptance has been approved by the District Court of the United States for the District of Colorado by order dated May 1, 1935. Subject to the provisions of said order, when this acceptance has been filed with said Court, the claim represented by the above bonds will be deemed to have been filed and allowed for the purpose of the acceptance of the Plan.

This acceptance of the Plan is revocable up to the date of the hearing on confirmation of the Plan by the Court, by filing written notice of such revocation with the Trustee of the Estate of The Colorado Fuel and Iron Company, Continental Oil Building, Denver, Colorado, signed and acknowledged by the owner at the time of such revocation of the bonds described above.

When the Plan is confirmed, notice of such fact and appropriate instructions with regard to the surrender of bonds in exchange for the new securities will be given to all bondholders.

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## Exhibit G.

Exhibit B. In the District Court of the United States  
for the District of Colorado

## Form of Acceptance for Bonds in Bearer Form

(N. B. This white counterpart is to be forwarded immediately to J. & W. Seligman & Co., 54 Wall Street, New York City, in accordance with the instructions on the reverse.)

In the Matter  
of  
The Colorado Fuel and Iron Company and Another, Colorado corporations,  
Debtors.

Acceptance No.....  
In Proceedings for  
Reorganization  
Consolidated Cause  
No. 8081

## Approval and Acceptance of Plan of Reorganization

The undersigned, the owner of \$.....principal amount of First Mortgage 5% Gold Bonds of The Colorado Industrial Company (guaranteed by The Colorado Fuel and Iron Company) bearing all coupons thereto appertaining maturing on and after August 1, 1933, and being bonds bearing the same serial numbers shown in the certificate below, hereby accepts and approves the "Plan of Reorganization of The Colorado Fuel and Iron Company (and The Colorado Industrial Company) dated March 1, 1935", heretofore proposed in the above proceedings, a copy of which Plan has been received by the undersigned, and authorizes Messrs. J. & W. Seligman & Co., the Reorganization Managers named in said Plan, on behalf of the undersigned in accordance with Article XII of said Plan, to file this acceptance with the Court at such time as said Reorganization Managers shall in their discretion determine and to carry said Plan into effect subject to the provisions of Section 77B of the Bankruptcy Act.

In Witness Whereof, the undersigned has executed this instrument this                      day of                      , 1935.

Signature guaranteed:

(Sign here) ..... [L. S.]

(signature of owner)

.....  
(Name of bank or trust company).....  
(Please also print or typewrite owner's name appearing  
above and address)by .....  
(official title)**Certificate of Bank or Trust Company**

The undersigned hereby certifies that it is a member of the Federal Reserve System and that it holds for the account of the above named.....

(Name of owner of Bonds)

\$ principal amount of The Colorado Industrial First Mortgage 5% Gold Bonds (bearing thereon the written guarantee of The Colorado Fuel and Iron Company), bearing all coupons thereto appertaining maturing on and after August 1, 1933, numbered as follows:

@ \$500, Numbers .....

@ \$1000, Numbers .....

.....  
(If bonds are held subject to pledge, certifying Bank or Trust Company may indicate this fact in the above space)

Upon written request from J. & W. Seligman & Co., 54 Wall Street, New York City, the Reorganization Managers named in the above mentioned Plan, the undersigned agrees that it will notify such Reorganization Managers whether or not it continues to hold the above bonds for the account of the owner named above.

Dated ....., 1935.

.....  
(Name of bank or trust company)

by .....

Authorized Officer.

## Exhibit H.

In the District Court of the United States  
For the District of Colorado

In the Matter

of

The Colorado Fuel and Iron Com-  
pany, and Another, Colorado cor-  
porations.

Debtors.

In Proceedings for  
Reorganization  
Consolidated  
Cause No. 8081.

Findings of Fact and Conclusions of Law  
Order Confirming Plan of Reorganization

Findings of Fact

This Cause came on to be heard on March 12, 1936 pursuant to an order of this Court dated January 27, 1936 entered herein on application of the Debtors for a hearing on confirmation of the Plan of Reorganization of The Colorado Fuel and Iron Company and The Colorado Industrial Company, dated March 1, 1935, filed herein March 12, 1935, and found by this Court, by order dated May 1, 1935, to have been duly proposed in accordance with the provisions of Section 77B of the Act entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States" approved July 1, 1898, as amended, (hereinafter referred to as "Section 77B").

At said hearing the following appeared:

Central Hanover Bank and Trust Company, Trustee under the General Mortgage, dated February 1, 1893, of The Colorado Fuel and Iron Company, by its counsel, Lewis and Grant.

The New York Trust Company, Trustee under the first mortgage, dated August 1, 1904, of The Colorado Industrial Company, by Grant, Ellis, Shaffroth & Toll and White & Case, its counsel.

The Colorado Fuel and Iron Company, (hereinafter called the "Fuel and Iron Company"), and The Colorado Industrial Company, (hereinafter called

the "Industrial Company"), by their counsel, Adams & Gast.

Arthur Roeder, Trustee of The Colorado Fuel and Iron Company and The Colorado Industrial Company, by his counsel, Fred Farrar.

J. & W. Seligman & Co., Reorganization Managers under the Plan of Reorganization, by Cravath, de Gersdorff, Swaine & Wood, their counsel.

Carl J. Schmidlapp, Bertram Cutler, John Evans, Frank Miller Gould, R. G. Page and John D. Rockefeller, 3rd, as the Protective Committee for the First Mortgage 5% Bonds of the Industrial Company, by their counsel, Milbank, Tweed, Hope & Webb.

Thatcher M. Brown, Harold Kountze, James B. Mabon and John C. Traphagen, as the Committee representing the General Mortgage 5% Bonds of the Fuel and Iron Company, by their counsel, Hodges, Wilson and Vidal.

Grayson M. P. Murphy, John W. Hanes, Andrew V. Stout and T. Johnson Ward, as the Protective Committee for the Preferred and Common Stock of the Fuel and Iron Company by their counsel, Cotton, Franklin, Wright & Gordon.

M. C. Zaidenberg, Louis Kalischer and Benjamin H. Roth, as the "Independent Committee" of bondholders, by Northcutt & Northcutt and Nevius, Brett & Kellogg, their counsel.

J. C. Adams, a holder of common stock of the Fuel and Iron Company, in person and by Parriott & Cranston, his counsel.

Cass M. Herrington, as special counsel appointed by the Court.

Said cause having been continued to this date, and upon consideration of the evidence and testimony taken in open Court and upon all the exhibits and other proofs offered in evidence in this cause, and all the files, papers, reports, petitions and orders and proceedings herein and the arguments of counsel,

The Court finds:

That at the time of the institution of these proceedings and, since August 1, 1933, the properties of the Fuel and Iron



Company had been in possession of Arthur Roeder, as Receiver appointed by this Court in Receivership Proceedings pending in this Court, and by the United States District Court for the District of Wyoming in Ancillary Proceedings, the proceedings in this Court being cause entitled "Bankers Trust Company, Trustee, Complainant, vs. The Colorado Fuel and Iron Company, Defendant, in Equity No. 10179", and consolidated cause entitled "The New York Trust Company, as Trustee, Complainant, vs. The Colorado Fuel and Iron Company, a Corporation, et al; Defendants, in Equity No. 10210" (hereinafter referred to as the "prior receivership proceedings").

That upon the inception of these proceedings and on August 1, 1934, said Arthur Roeder was, by order of this Court, temporarily appointed Trustee of the estate of the Fuel and Iron Company with the title and powers as specified in said order. On September 15, 1934, by order of this Court, after hearing before a Special Master, the appointment of Arthur Roeder as Trustee of the estate of the Fuel and Iron Company was made permanent and Arthur Roeder was also appointed permanent Trustee of the estate of the Industrial Company, and all the powers and duties conferred on said temporary Trustee by order dated August 1, 1934 were confirmed and continued in force and effect, except as modified. That Arthur Roeder (hereinafter referred to as the "Trustee") qualified as Trustee of the estates of the Fuel and Iron Company and the Industrial Company and since the entry of said orders has been and now is the duly appointed, qualified and acting Trustee of the estates of said Companies, (hereinafter referred to as the "Debtors"), and as Trustee, said Arthur Roeder has managed, operated and conducted the business and affairs of said Debtors.

That both The Colorado Fuel and Iron Company and The Colorado Industrial Company, Debtors, are corporations organized and existing under the laws of the State of Colorado and the principal place of business, as well as the principal assets of both Debtors are and for many years have been within the State of Colorado.

That the nature of the business of the Fuel and Iron Company is mainly the manufacture and sale of steel and iron products; the mining and sale of coal; the manufacture and

sale of coke and by-products of the manufacture of coke; and the mining of iron ore and other raw materials used in the manufacture of iron and steel. That said Company also owns the stocks and bonds of certain subsidiary companies, including all of the stock of the Industrial Company. That the Industrial Company is not engaged in any active business and does not own any assets of substantial value, having transferred substantially all of its assets to the Fuel and Iron Company in the year 1913. That neither the Fuel and Iron Company nor the Industrial Company is a utility or a utility corporation subject to regulatory authority under the laws of the State or States in which any properties of either of the Debtors are situated or operated.

That notice of the time and manner of filing claims and demands against said Debtors (other than claims in respect of the General Mortgage 5% Bonds of the Fuel and Iron Company and the First Mortgage 5% Bonds of the Industrial Company, and the coupons appurtenant to such bonds, and the claims of the Trustees under the mortgages securing such bonds), pursuant to order of this Court entered August 1, 1933 in the prior receivership proceedings, was duly given by the Receiver. That thereafter the time for filing such claims and demands was, by order of this Court, extended to and including April 15, 1934. That pursuant to orders entered from time to time in the prior receivership proceedings and in these proceedings, the Receiver or the Trustee has paid all claims and demands so filed with him which were approved by the Receiver and allowed by this Court. That certain claims so filed with the Receiver were not approved by him.

That by order dated September 15, 1934, it was provided that all claims and demands (other than claims of stockholders and bondholders) filed with the Receiver in the prior receivership proceedings and not approved by the Receiver were transferred to this cause and considered as claims against the Debtor or Debtors in these proceedings without the necessity of filing new or additional claims. That all claims filed with the Receiver in the prior receivership proceedings which were not approved by the Receiver, have been disallowed by order of this Court either in the prior receivership proceedings or in these proceedings and none of such claims

are now pending, except the claim of Electrical Products Consolidated, in the sum of \$3,600.00, which is now in litigation.

That by an order entered in these proceedings on March 12, 1935, it was provided that all claims and demands against said Debtors, except

- (1) the claims of holders of General Mortgage 5% Bonds of the Fuel and Iron Company and of holders of First Mortgage 5% Bonds of the Industrial Company, or of interest appertaining to said bonds, and of the Trustees under the mortgages securing said bonds,

- (2) such claims as had been theretofore properly filed with and disapproved by the Receiver in the prior receivership proceedings, and

- (3) claims arising out of or pertaining to the management of or the conduct of the ordinary business and operations of the Fuel and Iron Company by Arthur Roeder as Receiver or Trustee thereof.

should be presented to the Trustee on or before April 25, 1935, or thereafter, except upon further order of this Court for cause shown, be barred from participating in any Plan of Reorganization of the Fuel and Iron Company and the Industrial Company, and that upon the entry of any final order or decree herein confirming any Plan of Reorganization for said Debtors, such claims or demands not so presented should, except as otherwise ordered by Court for cause shown, be forever discharged and that the holders of such claims and demands be forever barred from asserting such claims or demands against the Debtors, the Receiver or the Trustee, or against any property then or thereafter in the estates of the Debtors or either of them. That notice of such order was duly given by the Trustee to creditors by publication and mailing, as directed in said order. That all claims and demands filed pursuant to said order have been adjusted and paid.

That at the date hereof there are outstanding in the hands of the public, \$4,483,000 principal amount face value of bonds of the Fuel and Iron Company, dated February 1, 1893, due February 1, 1943, generally known as General Mortgage 5% Bonds of the Fuel and Iron Company, secured by a mortgage or deed of trust of the Fuel and Iron Company dated Febru-

ary 1, 1893, and supplements thereto. That in addition to said \$4,483,000 of said bonds outstanding, \$599,000 of such bonds owned by the Fuel and Iron Company (together with \$100,000 principal amount of United States 3% Treasury Bonds) are deposited in trust, pursuant to an arrangement with the Industrial Commission of the State of Colorado, as security for the payment of workmen's compensation awarded and to be awarded under the law of the State of Colorado against the Fuel and Iron Company, the Receiver or the Trustee thereof.

That at the date hereof \$27,633,000 principal amount face value of bonds of the Industrial Company, dated August 1, 1904, and which matured August 1, 1934, generally known as the First Mortgage 5% Bonds of the Industrial Company secured by a mortgage or deed of trust of the Industrial Company dated August 1, 1904, and supplements thereto, are outstanding in the hands of the public, and in addition thereto \$7,741,000 principal amount are owned by the Fuel and Iron Company. That no interest has been paid on said Industrial Bonds since the installment due February 1, 1933, that is, the August 1, 1933 and subsequent interest installments have not been paid. That the interest accrued and unpaid on said Industrial Bonds at the rate therein expressed, as of March 10, 1936, is \$4,298,466.67. That the said Industrial Bonds are guaranteed both as to principal and interest by the Fuel and Iron Company.

That on August 1, 1934, the date upon which these proceedings were instituted by petitions filed herein by said Debtors, said Debtors were in default in the payment of three semi-annual installments of interest due on said Industrial Bonds and said Debtors and each of them was on that date and at all times since has been unable to meet its debts as they matured.

That there are outstanding in the hands of the public 20,000 shares of 8% cumulative preferred stock, par value \$100 per share, of the Fuel and Iron Company.

That there are outstanding in the hands of the public 340,505 shares of common stock, without par value, of the Fuel and Iron Company.

That all of the stock, that is 200 shares, all common stock,



par value \$100, of the Industrial Company, is owned by the Fuel and Iron Company.

That lists and statements showing the amount of the outstanding bonds and stock of the Debtors were, pursuant to order of Court, filed in these proceedings by the Trustee on October 31, 1934, modified as to the General Bonds of the Fuel and Iron Company by subsequent reductions from the application of sinking funds and as shown by the Interim Report of the Trustee filed herein March 12, 1936.

That pursuant to orders of this Court entered from time to time in the prior receivership proceedings and in these proceedings, the Receiver or the Trustee has paid, as it matured, all interest upon the General 5% Bonds of the Fuel and Iron Company outstanding in the hands of the public.

That said order of May 1, 1935, provided that claims and interests of the holders of Industrial Bonds and Preferred Stock and Common Stock might be filed or evidenced, and when so filed or evidenced shall be deemed allowed, for the purpose of the acceptance of the Plan, and such holders of Industrial Bonds and Preferred Stock and Common Stock, as required by Section 77B, may evidence their acceptance of the Plan, by filing in these proceedings written acceptances in substantially the respective forms annexed to said order dated May 1, 1935, such forms of acceptance, in the case of Industrial Bonds in bearer form, to be signed by the owners thereof and certified by a bank or trust company which is a member of the Federal Reserve System holding custody thereof, and, in the case of registered securities, to be signed by holders of record as of the close of business May 25, 1935 of Industrial Bonds in registered form and by holders of record as of the close of business May 25, 1935 of Preferred Stock and Common Stock.

That J. & W. Seligman & Co., the Reorganization Managers named in the Plan, have filed in these proceedings, on behalf of holders of Industrial Bonds and Preferred Stock and Common Stock, written acceptances in form approved by said order dated May 1, 1935, duly executed by such holders, as follows:

|                          | Total Maximum<br>amount includ-<br>ed in Class | Total amount<br>covered by<br>acceptances | Percentage<br>covered by<br>acceptances |
|--------------------------|--|---|---|
| Class I—Industrial Bonds | \$27,633,000                                   | \$20,928,000                              | 75.7%                                   |
| Class II—Preferred Stock | 20,000<br>shares                               | 12,261<br>shares                          | 61.3%                                   |
| Class III—Common Stock   | 340,505<br>shares                              | 181,174<br>shares                         | 53.2%                                   |

That within the meaning of subdivision (e) of Section 77B, the Plan has been duly accepted in writing, and such acceptance has been duly filed in these proceedings, by or on behalf of creditors holding more than two-thirds in amount of the claims against the Debtors of each class whose claims have been allowed and are affected by the Plan and by or on behalf of stockholders holding more than a majority of the stock of the Fuel and Iron Company of each class.

That there has also been filed in these proceedings, and in the prior receivership proceedings, verified reports of the Receiver or the Trustee showing what contracts of the Debtors, executory in whole or in part, and what unexpired leases have been rejected and surrendered.

That on March 12, 1936, Trustee filed a verified statement showing that during the pendency of these proceedings, as well as during the prior receivership proceedings, the common and preferred stock of the Fuel and Iron Company, the General Mortgage 5% Bonds of the Fuel and Iron Company, and the First Mortgage 5% Bonds of the Industrial Company have been listed upon the New York Exchange and have been actively dealt in on that Exchange, and that a comparison of stock lists indicates that during a period commencing August 1, 1934 to and including February 24, 1936, 277,620 shares of the common stock and 18,232 shares of the preferred stock of the Fuel and Iron Company were transferred upon the books of the Company. That said Company has no record of the sales and transfers of either of said bonds.

That the Reorganization Managers have caused the New Company, provided for by the Plan, to be incorporated, under the laws of the State of Colorado, under the corporate name of The Colorado Fuel and Iron Corporation (hereinafter referred to as the "New Company"). A copy of the Certifi-

cate of Incorporation of the New Company has been made a part of the record in these proceedings. The form of such Certificate of Incorporation has been determined by the Reorganization Managers with the approval of the Committees as provided in, and complies in all respects with the provisions of, the Plan, and is hereby approved. The first Board of Directors of the New Company designated in the Plan have been duly named in said Certificate of Incorporation.

That the lands of the Debtors not essential to operations and other properties no longer profitably employed in the operations of the Fuel and Iron Company, referred to in subdivision 1 of Article VI of the Plan (and which are to be excluded from the lien of the Income Mortgage provided for in the Plan) have been tentatively selected by the Trustee, as set forth in his above-mentioned Interim Report.

That notices as required by law and the orders of Court entered from time to time in these proceedings, including notice of a hearing on March 12, 1936, on the confirmation of the Plan of Reorganization and other purposes, have been given by publication and mailing, as in said orders directed.

#### Conclusions of Law

This Court concludes as a matter of law that it has exclusive jurisdiction of each of the Debtors and of the property of each of said Debtors wherever located for the purposes of these proceedings under Section 77B.

That the Plan of Reorganization of The Colorado Fuel and Iron Company and The Colorado Industrial Company, dated March 1, 1935, filed herein on March 12, 1935, was duly proposed in accordance with the pertinent provisions of Section 77B.

That the only creditors and stockholders whose claims and interests are affected by the Plan of Reorganization are the following, who were by order heretofore entered in this proceeding divided into the classes indicated according to the nature of their respective claims and interests:

Class I—The holders of First Mortgage 5% Bonds of the Industrial Company, due August 1, 1934 (hereinafter called the Industrial Bonds), which are guaranteed by the Fuel and Iron Company. \$27,633,000

principal amount of Industrial Bonds are outstanding in the hands of the public (exclusive of \$7,741,000 principal amount of Industrial Bonds which are held in the estate of the Fuel and Iron Company and, together with all the capital stock of the Industrial Company which is held in the estate of the Fuel and Iron Company, are to be cancelled under the Plan in the reorganization);

Class II—The holders of the 8% Cumulative Preferred Stock (\$100 par value) of the Fuel and Iron Company (hereinafter called the Preferred Stock) of which 20,000 shares are outstanding in the hands of the public; and

Class III—The holders of the Common Stock without par value of the Fuel and Iron Company (hereinafter called the Common Stock) of which 340,505 shares are outstanding in the hands of the public.

That the holders of any of the following claims are not affected by the Plan and it is not requisite to the consummation of the Plan that it be accepted by them, and that such claims may be adjusted or compromised and dealt with, paid or discharged, by the new corporation to be organized in pursuance of the Plan, unless otherwise paid or discharged by the Trustee, and that the property of the present corporation may be transferred to such new corporation subject to any lien or encumbrance relating to any of the said claims:

(a) the General Mortgage 5% Bonds of the Fuel and Iron Company, due February 1, 1943;

(b) claims of the United States of America and the State of Colorado;

(c) Workmen's Compensation claims;

(d) obligations of Arthur Roeder as Receiver in the prior receivership proceedings and as Trustee of the estates of the Debtors herein;

(e) obligations of the Fuel and Iron Company to its subsidiaries;

(f) current liabilities of the Fuel and Iron Company incurred in the ordinary conduct of its business prior to the appointment on August 1, 1933 of the receiver in the prior receivership proceedings; and

(g) claims, as adjusted or liquidated and allowed



by the Court, arising from the disaffirmance of contracts by Arthur Roeder as Receiver or Trustee as aforesaid.

That by order of this Court dated January 27, 1936, it was directed that a hearing be held before this Court on March 12, 1936, on the confirmation of the Plan and for the other purposes in said order specified. Notice of said hearing was duly given to creditors and stockholders by publication and mailing as provided in Section 77B and as directed in said order dated January 27, 1936. Said hearing was duly held and at said hearing the Debtors and all creditors and stockholders of the Debtors and all other interested parties had full opportunity to be heard upon the proposed confirmation of the Plan and upon all other questions specified in the notice of such hearing.

As to the aforesaid Plan of Reorganization of said Debtors, the Court is satisfied that:

(a) The Plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders of the Debtors, and is feasible;

(b) The Plan complies with the provisions of subdivision (b) of Section 77B;

(c) The Plan has been accepted as required by the provisions of subdivision (e), clause (1) of Section 77B;

(d) The provisions of subdivision (e), clause (2) of Section 77B are not applicable;

(e) All amounts, to be paid by the Debtors, or by the New Company (the only corporation acquiring the Debtors' assets under the Plan), and all amounts to be paid to Committees or Reorganization Managers, whether or not by the Debtors or the New Company for services or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject to the approval of this Court;

(f) The offer of the Plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act.

(g) The Debtors and the New Company (the only corporation issuing securities or acquiring property under the Plan) are authorized by their respective charters and by all applicable state or federal laws upon confirmation of the Plan, to take all action necessary to carry out the Plan.

The Court is satisfied that, by reason of the number of securities of the Debtors outstanding and the extent of the public dealing therein, the preparation of a statement showing what claims and shares of stock had been purchased or transferred by those accepting the Plan after the commencement or in contemplation of these proceedings, and the circumstances of such purchase or transfer, would be impracticable. No such statement need be filed.

That the tentative selection, as described by the Trustee in his Interim Report filed herein March 12, 1936, of lands not essential to the operations of the Fuel and Iron Company and all other properties no longer profitably employed in said operations, should be approved subject to the further approval by the Court of the lands finally selected and the legal descriptions thereof to be eliminated from the proposed Income Mortgage covering the properties of the New Company.

That the Certificate of Incorporation of the Colorado Fuel and Iron Corporation (the New Company) filed in the office of the Secretary of State of the State of Colorado on April 16, 1936, should be approved; and that said The Colorado Fuel and Iron Corporation (the New Company) is authorized by its charter and by applicable State and Federal laws upon confirmation of the Plan, to take all action necessary to carry out the Plan. Said New Corporation should be authorized to intervene and become a party to these proceedings.

That the Plan shall be binding upon each of the Debtors, all stockholders of each of the Debtors, including those who have accepted the Plan, as well as those who have not accepted it, and all creditors of each of the Debtors, secured or unsecured, whether or not affected by the Plan, and whether or not their claims have been filed in these proceedings, and, if so filed, whether or not approved and allowed, including creditors who have not accepted the Plan as well as those who have accepted it.

Notice having heretofore been given pursuant to an order dated March 12, 1935, requiring the claims of creditors (other than bondholders and other than creditors whose claims were filed in the prior receivership proceedings and disapproved by the Receiver) to be filed with the Trustee on or before April 25, 1935, all claims of such creditors not heretofore filed in these proceedings, should be finally barred and foreclosed, and no claim so barred or foreclosed should be enforced against the assets of the estate of either of the Debtors or against the New Company or against any assets, or any portion thereof, transferred, pursuant to the Plan, to the New Company, and no holder of any claim so barred or foreclosed should be entitled to any right whatsoever under the Plan, nor should any such claim be entitled to share in the distribution of any of the new securities provided for in the Plan.

No further filing or evidencing of the claims and interests of the holders of Industrial Bonds and Preferred and Common Stock should be required as a condition of their receiving the new securities provided for in the Plan, and, anything in any Order heretofore entered herein to the contrary notwithstanding, all holders of Industrial Bonds, Preferred Stock and Common Stock should be entitled to receive the new securities deliverable to such holders under the Plan, upon compliance with such reasonable regulations and instructions covering the endorsement and surrender of securities of the Debtors as the Reorganization Managers shall prescribe, or as the Court may order or approve.

April 25, 1936.

J. FOSTER SYMES, Judge.

#### Order Confirming Plan of Reorganization

This Cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows:

1. That the Certificate of Incorporation of The Colorado Fuel and Iron Corporation (in these proceedings designated as the "New Company") filed in the office of the Secretary of State of the State of Colorado on April 16, 1936, is hereby approved.
2. That the Plan of Reorganization of The Colorado Fuel

and Iron Company and The Colorado Industrial Company, dated March 1, 1935, filed herein March 12, 1935, is hereby confirmed and the Debtors, the Reorganization Managers, the Trustee, the New Company, and the New York Trust Company, as Trustee under the First Mortgage of The Colorado Industrial Company, dated August 1, 1904, are hereby authorized and directed to put into effect and to carry out said Plan of Reorganization in accordance with the provisions thereof, subject to such further orders as may hereafter be entered herein by this Court.

3. That the Plan and this Order shall be binding upon each of the Debtors, all stockholders of each of the Debtors, including those who have accepted the Plan, as well as those who have not accepted it, and all creditors of each of the Debtors, secured or unsecured, affected by the Plan, and whether or not their claims have been filed in these proceedings, and, if so filed, whether or not approved and allowed, including creditors who have not accepted the Plan as well as those who have accepted it.

4. That the claims of all creditors (except Bondholders and other creditors not affected by the Plan) which had not been filed with the Receiver in the prior receivership proceedings or with the Trustee in these proceedings on or before April 25, 1935, are finally barred and foreclosed and no claim so barred or foreclosed shall be enforced now or hereafter against the assets of the estate of either of said Debtors, nor against the New Company, nor against any assets transferred or conveyed, pursuant to the Plan and this Order, to the New Company, nor against any portion of said assets and no holder of any claim so barred or foreclosed shall be entitled to any right whatsoever under the Plan or this Order or be entitled to share in the distribution of any of the new securities provided for in the Plan.

5. No further filing or evidencing of the claims and interests of the holders of Industrial Bonds and Preferred Stock and Common Stock of The Colorado Fuel and Iron Company shall be required as a condition of their receiving the new securities provided for in the Plan, and, anything in this Order or in any Order heretofore entered herein to the contrary notwithstanding, all holders of Industrial Bonds and of said Preferred and Common Stock shall be entitled to receive



the new securities deliverable to such holders under the Plan, upon compliance with such reasonable regulations and surrender of securities of the Debtors as the Reorganization Managers shall prescribe, or as the Court may order or approve.

6. This Court hereby reserves and retains jurisdiction of these proceedings:

A. To approve the form of the new income mortgage, warrant agreement, instruments of conveyance and assumption and other documents necessary to carry the Plan into effect and to determine the manner in which and the time at which the new securities provided for in the Plan shall be distributed to holders of Industrial Bonds and Preferred Stock and Common Stock and generally to make such order or orders as by this Court may be deemed proper in connection with the transfer of the assets of the Debtors to the New Company and the issue of securities and assumption of obligations by the New Company.

B. Generally to determine any and all matters pertaining to these proceedings and to the Plan and not determined heretofore or by this Order and to make, from time to time, such further orders as to this Court may seem proper.

Any party to these proceedings or any creditor or stockholder of either of the Debtors or any other person whose rights are affected or determined by any of the provisions of this Order, including the Reorganization Managers and the New Company, may at any time apply to this Court for such orders and directions touching the matters hereby reserved or for such other and further relief as this Court may deem just and proper.

For further consideration of any or all of the matters reserved herein, this Court hereby sets this Cause for further hearing on Friday, May 22, 1936, at 10 o'clock A. M., and from time to time thereafter, as may be necessary and convenient, without further notice.

Dated April 25, 1936.

J. FOSTER SYMES, Judge.

Filed April 25, 1936, 11:55 A. M. Charles W. Bishop, Clerk.

United States of America, District of Colorado, ss.

I, Charles W. Bishop, Clerk of the United States District Court for the District of Colorado, do hereby certify that the foregoing is a true, complete and correct copy of Findings of Fact and Conclusions of Law and an Order entered by this Court on the Twenty-fifth Day of April, 1936, in a case then pending entitled, "In the Matter of The Colorado Fuel and Iron Company and another, Colorado Corporations, Debtors, in Proceedings for Reorganization, Consolidated Case No. 8081," as the same now remains of record in my office at Denver, Colorado.

In Testimony Whereof, I have hereto set my hand and the seal of this Court at Denver, Colorado, this ..... day of ..... 19.....

.....  
Clerk, United States District Court.

By: .....  
Deputy Clerk.

Exhibit I.

In the District Court of the United States  
For the District of Colorado.

In the Matter

of

The Colorado Fuel and Iron Company, and Another, Colorado corporations,

Debtors.

In Proceedings for  
Reorganization  
Consolidated Cause  
No. 8081

Order Approving the Form of Documents and Directing the Transfer of Assets to, and the Issue of Securities and Assumption of Liabilities by, the New Company

This cause coming on to be heard pursuant to an order of this Court dated April 25, 1936, confirming the "Plan of Reorganization of The Colorado Fuel and Iron Company (and The Colorado Industrial Company) dated March 1, 1935" (hereinafter called the Plan), upon the application of Messrs.

J. & W. Seligman & Co., the Reorganization Managers named in the Plan (hereinafter called the Reorganization Managers) for an order approving the form of documents, and directing the transfer of assets to, and the issue of securities and assumption of liabilities by, the New Company (which has heretofore become a party to these proceedings and consented to the entry of this order); and the Court having heard counsel and being fully advised in the premises, it is

Found, ordered, adjudged and decreed as follows:

Article One.

Documents Approved.

The Reorganization Managers have filed herein forms of the documents specified below to carry the Plan into effect. The form of each of such instruments has been determined by the Reorganization Managers and approved by the Committees as provided in, and complies in all respects with the provisions of, the Plan. Such documents are as follows:

(a) form of new Income Mortgage provided for in the Plan to be executed by The Colorado Fuel and Iron Corporation, the new company formed to carry out the Plan (hereinafter called the New Company) to The Chase National Bank of the City of New York and Carl E. Buckley, as Trustees, a copy of which is annexed hereto marked Exhibit A;

(b) form of Warrant Agreement to be entered into by the New Company with The Chase National Bank of the City of New York, as Warrant Agent, a copy of which is annexed hereto marked Exhibit B;

(c) form of stock certificate for Common Stock of the New Company, a copy of which is annexed hereto, marked Exhibit C;

(d) form of instrument of conveyance to be executed by The Colorado Fuel and Iron Company, one of the Debtors herein (hereinafter called the Fuel and Iron Company) and The Colorado Industrial Company, the other Debtor herein (hereinafter called the Industrial Company), the Trustee and The New York Trust Company, as Trustee of the First Mortgage of the Industrial Company, dated August 1, 1904 (hereinafter called the Industrial Trustee) to the New Company, a

copy of which is annexed hereto marked Exhibit D; and

(e) form of instrument of assumption to be executed by the New Company to Central Hanover Bank and Trust Company, as Trustee under the General Mortgage of the Fuel and Iron Company, dated February 1, 1893, assuming the payment of the Bonds outstanding thereunder, a copy of which is annexed hereto marked Exhibit E.

The foregoing documents, including the form of Income Mortgage Bonds included in said Income Mortgage, Exhibit A, and the form of Warrants and Scrip for Warrants included in said Warrant Agreement, Exhibit B, are hereby approved.

#### Article Two.

Transfer of Assets to New Company and New Subsidiary and Issuance of New Securities.

##### A. Transfer of Assets.

On July 1, 1936, or on such later date, as soon as practicable after July 1, 1936, as may be determined by the Reorganization Managers, the Fuel and Iron Company, the Industrial Company, the Trustee and the Industrial Trustee shall assign, transfer, convey and deliver to the New Company all their respective right, title and interest in and to all the assets and properties of every nature and description, tangible and intangible, real, personal or mixed, and wheresoever situated, of the Fuel and Iron Company and the Industrial Company, of the Industrial Trustee, as Trustee under the aforesaid First Mortgage, and of the estates of the Debtors and the Trustee (including all special funds and deposits and all cash and securities held by the Industrial Trustee), and the rights, privileges, good will and, in so far as permitted by law, the franchises of the Fuel and Iron Company and the Industrial Company, by executing and delivering to the New Company an instrument of conveyance in substantially the form annexed hereto as Exhibit D, with such changes, if any, therein as shall be approved by the Court.

Said transfer shall be effective as of midnight June 30, 1936, and the operation and conduct of all of the business and affairs of the Fuel and Iron Company and the Industrial



Company by the Trustee after said date shall be deemed to be and shall be for the account of the New Company as fully and to the same extent as if the New Company had taken title to said properties and had assumed the operation thereof at midnight June 30, 1936.

**B. Issuance of New Securities.**

Simultaneously with the transfer provided for under A above, or promptly thereafter, the New Company shall execute and deliver to The Chase National Bank of the City of New York, as Warrant Agent, a Warrant Agreement in substantially the form annexed hereto as Exhibit B, with such changes, if any, therein as shall be approved by the Court, and as partial consideration for such transfer, shall cause to be issued to or on the order of the Reorganization Managers the following:

(1) 552,660 shares of Common Stock without par value of the New Company.

(2) Warrants (and scrip for Warrants) representing the right to purchase on the terms provided in the Plan, 315,379 shares of Common Stock of the New Company.

and shall agree to cause to be issued to or on the order of the Reorganization Managers \$11,053,200 principal amount of 5% Income Mortgage Bonds of the New Company. The consideration for the issuance to or on the order of the Reorganization Managers of said shares of Common Stock and Warrants is adequate, and said 552,660 shares of Common Stock, when issued to or on the order of the Reorganization Managers and distributed by them as in this Order provided, and said 315,379 shares of Common Stock, when issued upon the exercise of such Warrants and against payment to the New Company of the amounts specified in such Warrants, will be full-paid and non-assessable.

Promptly upon the issue of such shares of stock to or on the order of the Reorganization Managers, they shall vote such shares, or cause such shares to be voted, at a meeting of shareholders of the New Company to be held for the purpose, to authorize and consent to the creation by the Board of Directors of the New Company of a new Income Mortgage in substantially the form annexed hereto as Exhibit A, to secure

an issue of \$11,053,200 principal amount of 5% Income Mortgage Bonds. The properties of the Debtors described in the Report of the Trustee annexed hereto as Exhibit F, which are to be excluded from the lien of said new Income Mortgage, have been determined by the Reorganization Managers with the approval of the Committees as provided in the Plan, and are hereby approved.

Promptly after such meeting of shareholders, the New Company shall execute and deliver to The Chase National Bank of the City of New York and Carl E. Buckley, as Trustees, its new Income Mortgage in substantially said form and shall cause to be issued to or on the order of the Reorganization Managers \$11,053,200 principal amount of its 5% Income Mortgage Bonds.

**C. Assumption of General Mortgage 5% Bonds.**

Simultaneously with the transfer provided for under A above, or promptly thereafter, and as partial consideration therefor, the New Company shall deliver to Central Hanover Bank and Trust Company, successor trustee under the General Mortgage of the Fuel and Iron Company dated February 1, 1893, an instrument in substantially the form annexed hereto as Exhibit E, with such changes, if any, therein, as shall be approved by the Court, assuming and agreeing to pay the principal of and interest on the General Mortgage 5% Bonds outstanding under said General Mortgage, and to observe and perform all the other covenants and conditions of said General Mortgage on the part of the Fuel and Iron Company to be observed and performed.

**D. Cancellation of First Mortgage of the Industrial Company.**

Simultaneously with the transfer provided for under A above, or promptly thereafter, the Trustee shall surrender to the Industrial Trustee for cancellation and the Industrial Trustee shall cancel and discharge the \$7,741,000 principal amount of Industrial Bonds held in the estate of the Fuel and Iron Company, and the Industrial Trustee shall execute and deliver to the New Company a proper instrument, in form for recording approved by the Reorganization Managers, satisfying and discharging the First Mortgage of the Industrial

Company dated August 1, 1904, and supplements thereto. Thereupon the Industrial Trustee shall be released and discharged from all further obligations and liabilities under or arising out of said First Mortgage dated August 1, 1904, or the supplements thereto.

#### E. Cancellation of Stock of Industrial Company.

Simultaneously with the delivery of the instrument of satisfaction provided for under D above, or promptly thereafter, the Trustee shall surrender to the Industrial Company for cancellation the shares of stock of the Industrial Company held in the estate of the Fuel and Iron Company, and the Industrial Company shall thereupon cancel such shares and dissolve.

#### F. General.

The New Company is hereby authorized and directed to carry out all the terms and provisions of said instrument of conveyance, Exhibit D, said Warrant Agreement, Exhibit B, said Income Mortgage, Exhibit A, and said instrument of assumption, Exhibit E.

The provisions of this Order directing the transfer and delivery of the properties and assets of the Debtors to the New Company, the assumption by the New Company of certain obligations of the Debtors and of the Trustee as hereinabove and in Article Three hereof provided, and the issue by the New Company to or on the order of, and the distribution by, the Reorganization Managers of the New Securities, shall be a single and entire order and direction, notwithstanding the provisions hereof permitting the transfer of said properties and assets forthwith and without awaiting the assumption by the New Company of said liabilities or the issue, delivery and distribution of the New Securities.

#### Article Three

##### New Company to Assume Certain Other Liabilities

The New Company, as partial consideration for the assets transferred to it pursuant to Article Two of this Order and in addition to the securities to be issued and assumed pursuant to the provisions of subdivisions B and C of Article Two of this Order, shall assume the performance of all obligations by

the Plan provided to be assumed by the New Company, including all liability for the payment of, and shall pay in cash in full, the following:

(1) All claims of the United States of America and the State of Colorado;

(2) All workmen's compensation claims;

(3) All obligations of Arthur Roeder as Receiver in the receivership proceedings pending in this Court at the time of the institution of these proceedings (being the cause entitled "Bankers Trust Company, Trustee, Complainant, vs. The Colorado Fuel and Iron Company, Defendant, in Equity No. 10179," and the consolidated cause entitled, "The New York Trust Company, as Trustee, Complainant, vs. The Colorado Fuel and Iron Company, a corporation, et al., Defendants, In Equity No. 10210"), and all obligations of said Arthur Roeder as Trustee of the estates of the Debtors herein;

(4) All obligations of the Fuel and Iron Company to its subsidiaries;

(5) All current liabilities of the Fuel and Iron Company incurred in the ordinary conduct of its business prior to the appointment on August 1, 1933 of the receiver in the aforesaid receivership proceedings;

(6) All claims, as adjusted or liquidated and allowed by this Court, arising from the disaffirmance of contracts by Arthur Roeder as Receiver or Trustee as aforesaid; and

(7) All amounts which may hereafter be allowed by this Court as compensation for services rendered or as reimbursement for expenditures incurred in connection with these proceedings and the prior receivership proceedings and the Plan, by the Trustee, officers, parties in interest, depositaries, the Reorganization Managers, the Committees or their representatives, creditors or stockholders, and the attorneys or agents of any of the foregoing and of the Debtors.

The New Company shall take all the assets transferred to it pursuant to Article Two of this Order and shall receive any and all instruments of transfer or assignment thereof, subject to the express condition that the New Company shall perform the obligations required by this Article Three to be



assumed by the New Company and, upon such transfer, the Trustee shall be relieved of any and all further duties and responsibilities in respect of any such obligations. This Court expressly retains jurisdiction of the assets so transferred and reserves the right to retake such assets and to apply them to the satisfaction of said obligations in case the New Company shall fail to comply with any order of this Court directing such performance within twenty days after the service of a copy of such order, or, if an appeal be taken from any such order, within twenty days after written notice of the final affirmance of such order upon appeal.

#### Article Four,

##### Manner and Terms of Distribution of New Securities.

As soon as reasonably practicable after the issuance to or on the order of the Reorganization Managers by the New Company of the New Securities hereinabove in subdivision B of Article Two of this Order directed to be issued, the Reorganization Managers shall cause the Income Bonds, Common Stock and Warrants or scrip for Warrants received by them pursuant to said subdivision B of Article Two (said Income Bonds, Common Stock and Warrants and scrip being hereinafter sometimes referred to collectively as the "New Securities"), to be distributed to the holders of Industrial Bonds and Preferred Stock and Common Stock, in accordance with the Plan and with this Order. No further filing or evidencing of the claims and interests of the holders of Industrial Bonds and Preferred Stock and Common Stock shall be required as a condition of their receiving the New Securities as hereinafter provided, but the Reorganization Managers shall prescribe reasonable regulations and instructions governing the endorsement and surrender of securities of the Debtors, with which the holders thereof must comply in order to receive the New Securities therefor deliverable to such holders under the Plan. The date on which the New Securities are available for such distribution shall be announced in the manner provided in Article Five hereof.

The Reorganization Managers may appoint a bank or trust company in the City of New York and a bank or trust company in the City of Denver (hereinafter referred to as the "Distributing Agents") as custodians, and deliver the New

Securities to the Distributing Agents to be held and disposed of subject to the instructions of the Reorganization Managers. In such case, such instructions shall provide for the distribution of the New Securities to the holders of the Industrial Bonds and Preferred Stock and Common Stock in accordance with the provisions of the Plan and of this Order, and shall be embodied in or accompanied by all such authorizations or agreements as shall be necessary or convenient and proper to empower and direct the Distributing Agents to make such distribution.

The New Company shall cause to be prepared and made available for distribution the New Securities in such amounts and denominations as may be required for distribution to the creditors and stockholders of the Debtors, in accordance with the provisions of the Plan and of this Order.

Upon surrender to the Reorganization Managers, or to the Distributing Agents, of outstanding Industrial Bonds or certificates of Preferred and Common Stock of the Fuel and Iron Company, the Reorganization Managers, or the Distributing Agents if appointed, shall distribute to the respective holders of such Industrial Bonds or Preferred and Common Stock, such kinds and amounts of New Securities as under the terms of the Plan such holders are entitled to receive.

The Reorganization Managers, or the Distributing Agents if appointed, shall from time to time transfer Warrants for full shares of new Common Stock to the New Company or its agents, in exchange for scrip for such Warrants in such denominations as shall be necessary to effect distributions of scrip under the provisions of the Plan and of this Order; and the Warrants for full shares of new Common Stock so transferred shall, upon the distribution of scrip for such Warrants, be deemed to be distributed under the provisions of the Plan and of this Order, but shall be held by the New Company or its agents for the purpose of honoring such scrip so long as such scrip shall remain valid and outstanding.

Any dividends or interest which may be paid in respect of any of the New Securities during the periods when such New Securities shall be held by the Reorganization Managers, or the Distributing Agents if appointed, shall be received and held by the Reorganization Managers or the Distributing

Agents, as the case may be. Thereafter, upon the distribution of any such New Securities to the holders of Industrial Bonds, there shall be paid to the respective distributees such dividends or interest as may have been paid in respect of the New Securities so distributed to them.

Upon the expiration of three years after the announcement that the New Securities are available for distribution, the Reorganization Managers, or the Distributing Agents if appointed, may at any time deliver to the New Company all of the New Securities which then remain undistributed, together with the amounts of all dividends received thereon. The New Securities and the amounts of all dividends so delivered to the New Company shall be held by the New Company subject to the rights, under the provisions of the Plan and of this Order, of the holders of outstanding Industrial Bonds and certificates for Preferred and Common Stock of the Fuel and Iron Company. From and after the date of such delivery any surrender of such Industrial Bonds and certificates of Preferred and Common Stock, shall be made to the New Company.

Prior to the announcement that the New Securities are available for distribution, no holder of any Industrial Bonds or Preferred and Common Stock of the Fuel and Iron Company shall have any right, title or interest in the stock or other securities issued by the New Company, or any right to receive any such stock or other securities.

#### Article Five.

##### Date of Distribution of New Securities and Notice Thereof.

When the New Securities are available for distribution in accordance with the provisions of the Plan and of this Order, the Reorganization Managers shall cause an announcement of that fact to be published once in a newspaper published and of general circulation in Denver and once in a newspaper published and of general circulation in New York.

The Trustee shall also cause notices that the New Securities are available for distribution to be mailed to all holders of Industrial Bonds or certificates of stock of the Fuel and Iron Company appearing as such on the books of the Trustee.

## Article Six.

## Injunction.

All creditors and stockholders of the Fuel and Iron Company and the Industrial Company are hereby severally and respectively perpetually enjoined from prosecuting against the New Company, or against any nominee or assignee or grantee of the New Company, or against any person or persons, corporation or corporations claiming by, under or through the New Company, or against any of the assets transferred to the New Company pursuant to this Order, or against the Industrial Trustee, any suit or proceeding arising out of or based on any obligation or liability of, or interest in, the Fuel and Iron Company or the Industrial Company, or otherwise to impose liability upon the New Company or upon any nominee or assignee or grantee of the New Company or any party to these proceedings or upon any person or persons, corporation or corporations, claiming by, under or through the New Company, or upon the assets transferred to the New Company pursuant to this Order, or upon the Industrial Trustee, in respect of any claim against or interest in either of the Debtors, or to charge the New Company or any nominee, assignee or grantee of the New Company or any party to these proceedings, or any person or persons, corporation or corporations claiming by, under or through the New Company, or any assets transferred to the New Company pursuant to this Order, or the Industrial Trustee, with any liability on or in respect of any matter adjudicated by this Order, except pursuant to the provisions of and in subordination to this order; provided, however, that nothing herein contained shall be deemed to limit or restrict the right of any claimant whose claim or part thereof is required to be assumed or paid under the provisions of this Order as part of the consideration for the assets transferred hereunder or any part thereof to take herein such proceedings in respect thereof as may be authorized or permitted by this Order, or the right of the holder of any lien or charge subject to which the assets transferred under this Order are to be transferred to enforce such lien or charge.



## Article Seven.

## Matters Reserved.

This Court hereby reserves and retains jurisdiction of these proceedings and the subject-matter thereof for all purposes. Dated June 20, 1936.

J. FOSTER SYMES, District Judge.

Filed June 20, 1936, 11:30 A. M. Charles W. Bishop, Clerk.

United States of America, District of Colorado, ss.

I, Charles W. Bishop, Clerk of the United States District Court for the District of Colorado, do hereby certify that the foregoing is a true, complete and correct copy of an Order (without the exhibits therein referred to) entered by this Court on the 20th day of June, 1936, in a cause then pending entitled, "In the Matter of The Colorado Fuel and Iron Company and another, Colorado Corporations, Debtors, in Proceedings for Reorganization, Consolidated Cause No. 8081," as the same now remains of record in my office at Denver, Colorado.

In Testimony Whereof, I have hereto set my hand and the seal of this Court at Denver, Colorado, this .....day of ....., 19.....

.....  
Clerk, United States District Court.

By: .....  
Deputy Clerk.

## Exhibit J.

The Colorado Fuel and Iron Corporation  
to

The Chase National Bank of the City of New York  
as Warrant Agent

Warrant Agreement.

Dated July 1, 1936.

Warrant Agreement dated July 1, 1936, between The Colorado Fuel and Iron Corporation, a corporation organized and existing under the laws of the State of Colorado (hereinafter called the "Company"), party of the first part, and The Chase National Bank of the City of New York, a corporation organized and existing as a national banking association under the laws of the United States of America, as Warrant Agent (hereinafter called the "Agent"), party of the second part.

Whereas the Company has been organized pursuant to the "Plan of Reorganization of The Colorado Fuel and Iron Company (and The Colorado Industrial Company) dated March 1, 1935," to be the New Company referred to in said Plan, and said Plan has been duly confirmed by the District Court of the United States for the District of Colorado by its order dated April 25, 1936, entered in the cause therein pending entitled "In the Matter of The Colorado Fuel and Iron Company and Another, Colorado corporations, Debtors; in Proceedings for Reorganization; Consolidated Cause No. 8081"; and

Whereas by the provisions of the aforesaid Plan and order of Court the Company is required to issue Warrants (hereinafter called the "Warrants") for the purchase of a total of 315,379 shares of its Common Stock and in certain cases Scrip (hereinafter called the "Scrip") for fractional interests in such Warrants; and

Whereas the Company is authorized to issue 1,000,000 shares of Common Stock without par value, of which 552,660 shares are or are to be issued and presently outstanding and 315,379 shares are and have been reserved for issuance upon the exercise of such Warrants, and the Company has given to the Transfer Agent and Registrar for its Common Stock irrevocable instructions to that end;

Now, Therefore, This Agreement Witnesseth:

That in consideration of the premises and of Ten Dollars by the Agent to the Company in hand paid, receipt whereof is hereby acknowledged, and in order to declare the terms upon which such Warrants and Scrip may be issued and the terms and conditions upon and subject to which such Warrants may be exercised and such Scrip may be exchanged for Warrants, the Company covenants and agrees with the Agent, for the benefit of those who from time to time shall become and be holders of the Warrants or Scrip, as hereinafter set forth.

First. The text of the Warrants and of the form of election to purchase shares to be endorsed on the reverse thereof shall be substantially as follows:

Void After February 1, 1950.

No. W..... Warrant For the Purchase of  
for the purchase of .....Shares.  
Common Stock  
of

The Colorado Fuel and Iron Corporation

This is to Certify that

for value received, is entitled to purchase from The Colorado Fuel and Iron Corporation, a Colorado corporation (hereinafter called the "Company"), at any time on or before February 1, 1950, except while the transfer books for the Common Stock of the Company shall be closed ....., fully paid and non-assessable shares of the Company's Common Stock without par value, at the price of \$35 per share (hereinafter called the "warrant price"), upon surrender to the Company at the principal office in the City of New York of the Warrant Agent hereinafter mentioned (or of its successor as Warrant Agent) of this Warrant properly endorsed, with the form of election to purchase on the reverse hereof duly filled in and signed, and upon payment of the warrant price for the number of shares in respect of which this Warrant is exercised; provided, however, that under certain conditions set forth in the Warrant Agreement hereinafter mentioned the number of shares of the Company's Common Stock purchasable upon the exercise of this Warrant may be increased or reduced and the warrant price may be adjusted, or securities

other than shares of said Common Stock may become purchasable in lieu thereof upon the exercise of this Warrant. As provided in said Warrant Agreement, the warrant price is payable upon the exercise of this Warrant either in cash, by certified check or bank draft drawn upon New York funds, or by 5% Income Mortgage Bonds of the Company, when presented in negotiable form, accompanied by all unmatured coupons thereto appertaining, which 5% Income Mortgage Bonds will be accepted at their principal amount flat, for a total principal amount not exceeding the aggregate warrant price for all shares in respect of which Warrants are at the time exercised, as a credit on account of such aggregate warrant price and provided that simultaneously any balance of such warrant price is paid in cash, by certified check or bank draft as aforesaid. The right of purchase represented by this Warrant is exercisable, at the election of the holder of record hereof (or, when surrendered properly endorsed in blank, the bearer hereof), either as an entirety or from time to time for part only of the shares specified herein and, in the event that this Warrant is exercised in respect of less than all of such shares, a new Warrant for the remaining number of such shares will be issued on such surrender.

This Warrant is issued under and the rights represented hereby are subject to the provisions of the Warrant Agreement dated July 1, 1936, between the Company and The Chase National Bank of the City of New York, as Warrant Agent, a copy of which Warrant Agreement is on file with said Warrant Agent and to which Warrant Agreement reference is hereby made for a more complete statement of the rights of the holder hereof and of the rights and duties of the Warrant Agent and the rights and obligations of the Company thereunder. As provided in said Warrant Agreement, the Company shall not be required upon the exercise of this Warrant to issue certificates representing any fraction or fractions of a share of stock, but may issue in lieu thereof one or more non-dividend-bearing and non-voting certificates, in such form or forms and containing such terms and conditions as shall be fixed by its board of directors, each representing a fractional right to receive from the Company a certificate representing a full share of stock when presented with other like certificates representing other fractional rights in the aggregate equal to the right to receive at least one full share of stock.



This Warrant and similar Warrants when surrendered properly endorsed at the principal office in the City of New York of the Warrant Agent (or of its successor as Warrant Agent) may be exchanged for another Warrant, or other Warrants of different denominations, of like tenor and representing in the aggregate the right to purchase a like number of shares of the Company's Common Stock.

This Warrant is transferable on the books of the Company at the principal office in the City of New York of the Warrant Agent (or of its successor as Warrant Agent) by the above-named holder of record in person or by duly authorized attorney, upon surrender of this Warrant properly endorsed. The Company and the Warrant Agent may treat the holder of record of this Warrant (or, when presented properly endorsed in blank, the bearer hereof) as the absolute owner hereof for all purposes and shall not be affected by any notice to the contrary.

This Warrant and All Rights Represented Hereby Shall Be Void After February 1, 1950.

This Warrant is not valid until countersigned by the Warrant Agent.

Witness the facsimile seal of the Company and the facsimile signatures of its duly authorized officers.

Dated: July 1, 1936.

The Colorado Fuel and Iron Corporation,

By

President.

Attest:

Secretary.

Countersigned:

The Chase National Bank of the City of New York,

as Warrant Agent,

By

Assistant Cashier.

## [Form Of]

## Election to Purchase

19.....

To The Colorado Fuel and Iron Corporation:

The undersigned hereby irrevocably elects to exercise the right of purchase represented by the within Warrant for, and to purchase thereunder, ..... shares of the stock provided for therein, and requests that certificates for such shares shall be issued in the name of ..... and be delivered to .....

at ..... and, if said number of shares shall not be all the shares purchasable thereunder, that a new Warrant for the balance remaining of the shares purchasable under the within Warrant be delivered to the undersigned at the address stated below.

Signature: .....

Address: .....

Second. The text of the Scrip shall be substantially as follows:

Void After December 31, 1940.

No. WS .....

Scrip Certificate

for

Warrant

for the purchase of

Common Stock

of

For /4th(s)

of a

Warrant

For the purchase of

One Share.

The Colorado Fuel and Iron Corporation

This is to Certify that the bearer hereof, upon surrender, at any time on or before December 31, 1940, to the Colorado Fuel and Iron Corporation, a Colorado corporation (hereinafter called the "Company"), at the principal office in the City of New York of the Warrant Agent hereinafter mentioned (or of its successor as Warrant Agent) of this scrip certificate

together with other scrip certificates of like tenor in the aggregate calling for a Warrant for the purchase of one or more full shares of the Company's Common Stock without par value, for value received, is entitled to receive in exchange therefor a Warrant, in registered form, issued under the Warrant Agreement hereinafter mentioned, entitling the holder thereof to purchase, at any time on or before February 1, 1950, upon the terms provided in said Warrant Agreement, the number of shares of Common stock of the Company equal to the highest integral number included in the aggregate of the fractional interests represented by the scrip certificates so surrendered; and the bearer hereof will be entitled also to receive a new scrip certificate for any remaining fractional interest represented by the scrip certificates so surrendered. The fractional interest represented by this scrip certificate is stated at the upper right-hand corner hereof.

This scrip certificate is issued under and the rights represented hereby are subject to the provisions of the Warrant Agreement dated July 1, 1936, between the Company and The Chase National Bank of the City of New York, as Warrant Agent, a copy of which Warrant Agreement is on file with said Warrant Agent, and to which Warrant Agreement reference is hereby made for a more complete statement of the rights of the bearer hereof and the rights and duties of the Warrant Agent and the rights and obligations of the Company thereunder. As more fully stated in said Warrant Agreement, each Warrant issued thereunder entitles the registered holder of such Warrant to purchase, at any time on or before February 1, 1950, the number of shares of the Company's Common Stock therein specified, at the price of \$35 per share (hereinafter called the "warrant price"), payable in cash or by 5% Income Mortgage Bonds of the Company at their principal amount flat; provided, however, that under certain conditions set forth in said Warrant Agreement the number of shares of the Company's Common Stock purchasable upon the exercise of such Warrant may be increased or reduced and the warrant price may be adjusted, or securities other than shares of said Common Stock may become purchasable in lieu thereof upon the exercise of such Warrant.

This scrip certificate is issued subject to the condition, and every bearer hereof by accepting the same consents and agrees,

that title to this scrip certificate, and all rights represented hereby, are transferable by delivery with the same effect as in the case of a negotiable instrument payable to bearer, and the Company and the Warrant Agent may treat the bearer of this scrip certificate as the absolute owner hereof for all purposes and shall not be affected by any notice to the contrary.

This Scrip Certificate and All Rights Represented Hereby Shall Be Void After December 31, 1940.

This scrip certificate is not valid until countersigned by the Warrant Agent.

Witness the facsimile seal of the Company and the facsimile signatures of its duly authorized officers.

Dated: July 1, 1936.

The Colorado Fuel and Iron Corporation,

By

President.

Attest:

Secretary.

Countersigned:

The Chase National Bank of the City of New York,  
as Warrant Agent,

By

Assistant Cashier.

Third. The Warrants and Scrip shall be executed on behalf of the Company by the manual or facsimile signature of the present or any future President or of any present or future Vice President of the Company, under its corporate seal, affixed or in facsimile, attested by the manual or facsimile signature of the present or any future Secretary or of any present or future Assistant Secretary of the Company. The Warrants and Scrip shall be countersigned by the Agent (or by any successor to the Agent) then acting as Warrant Agent under this Agreement and shall not be valid until so countersigned. Warrants and Scrip may be so countersigned, however, by the Agent (or by its successor as Agent) and be delivered by such Agent, notwithstanding that the persons whose manual or facsimile signatures appear thereon as proper officers of the Company shall have ceased to be such officers at the time of



such countersignature or delivery. All Warrants shall be lettered W and, irrespective of the number of shares specified therein, shall be numbered from 1 consecutively upwards. The certificates for Scrip shall be lettered WS and, irrespective of the respective fractional interests represented by each, shall be numbered from 1 consecutively upward. Upon the written order of the Company, signed by the President or a Vice President and by the Secretary or Treasurer or an Assistant Secretary or an Assistant Treasurer of the Company, Warrants and Scrip shall be countersigned by the Agent and delivered from time to time, on or before their respective dates of expiration, for the respective numbers of shares (or in the case of Scrip, the respective fractional interests in Warrants) of the Company's Common Stock, not to exceed (except as provided in Section Eight of this Agreement) 315,379 such shares as constituted July 1, 1936, and, in the case of Warrants, in such names as the Company in such order shall direct.

Fourth. Title to the Warrants and the rights represented thereby shall be transferable on the books of the Company kept for such purpose at the principal office in the City of New York of the Agent (or of its successor as Agent), by the respective holders of record of such Warrants in person or by duly authorized attorney, upon surrender of such Warrants properly endorsed and accompanied by the requisite documentary stamps for the payment of the transfer taxes, if any, incident to their transfer or New York funds sufficient to purchase such stamps. Thereupon, a new Warrant or new Warrants, registered in the name of the transferee or respective transferees, shall be issued. Warrants also shall be exchangeable at the option of the holder of record thereof, when surrendered properly endorsed at the principal office in the City of New York of the Agent (or of its successor as Agent) for another Warrant, or other Warrants of different denominations, of like tenor and representing in the aggregate the right to purchase a like number of shares of the Company's Common Stock. The Company and the Agent may treat the holder of record of any of the Warrants (or, when presented properly endorsed in blank, the bearer thereof) as the absolute owner thereof for all purposes and shall not be affected by any notice to the contrary.

Fifth. Subject to the provisions of this Agreement, each

holder of record of Warrants (or, when properly endorsed in blank, each bearer thereof) shall have the right, which may be exercised as in such Warrants expressed, to purchase from the Company (and the Company shall issue and sell to such holder or bearer of Warrants) the number of fully paid and non-assessable shares of its Common Stock without par value provided in such Warrants, upon surrender to the Company at the principal office in the City of New York of the Agent (or of its successor as Agent) of such Warrants properly endorsed, with the form of election to purchase on the reverse thereof duly filled in and signed, and upon payment to such Agent for the account of the Company of the warrant price, determined in accordance with the provisions of Section Tenth of this Agreement, for the number of shares in respect of which such Warrants are then exercised. Payment of such warrant price may be made in cash, by certified check or bank draft drawn upon New York funds, or by 5% Income Mortgage Bonds of the Company, when presented in negotiable form, accompanied by all unmatured coupons thereto appertaining, which 5% Income Mortgage Bonds will be accepted at their principal amount flat, for a total principal amount not exceeding the aggregate warrant price for all shares in respect of which Warrants are at such time exercised, as a credit on account of such aggregate warrant price and provided that simultaneously any balance of such warrant price is paid in cash by certified check or bank draft as aforesaid. Upon such surrender of Warrants, and payment of the warrant price as aforesaid, the Company shall issue and cause to be delivered with all reasonable dispatch to or upon the written order of the holder or bearer as aforesaid of such Warrants and in such name or names as such holder or bearer may designate, a certificate or certificates for the number of full shares of stock purchasable upon the exercise of such Warrants, together with such if any certificate for any fraction or fractions of a share of such stock (if fractional shares are then called for by the Warrants outstanding) as the Company pursuant to the provisions of Section Eleventh of this Agreement shall have elected to issue. Such certificate or certificates shall be deemed to have been issued and any person so designated to be named therein shall be deemed to have become a holder of record of such shares, except for the right to vote on such shares or to consent or to receive notice as a stockholder, as of the date of the surrender

of such Warrants and payment of the warrant price as aforesaid; provided, however, that if at the date of surrender of such Warrants and payment of such warrant price, the transfer books for the Company's Common Stock or other class of stock purchasable upon the exercise of such Warrants shall be closed, the certificates for the shares in respect of which such Warrants are then exercised shall be issuable as of the date on which such books shall next be opened (whether before, on or after February 1, 1950) and until such date the Company shall be under no duty to deliver any certificate for such shares; provided further, however, that the transfer books aforesaid, unless otherwise required by law, shall not be closed at any one time for a period longer than twenty days. The rights of purchase represented by the Warrants shall be exercisable, at the election of the holders of record thereof (or, when presented properly endorsed in blank, the bearers thereof), either as an entirety or from time to time for part only of the shares specified therein and, in the event that any Warrant is exercised in respect of less than all of the shares specified therein at any time prior to the date of expiration of the Warrants a new Warrant or Warrants will be issued for the remaining number of shares specified in the Warrant so surrendered, and the Agent is hereby irrevocably authorized to countersign and to deliver the required new Warrants pursuant to the provisions of this Section and of Section Fourth of this Agreement and the Company, whenever required by the Agent, will supply the Agent with Warrants duly executed on behalf of the Company for such purpose.

Sixth. Title to Scrip and all interests represented thereby shall be transferable by delivery. Each bearer of Scrip shall have the right, which may be exercised as in such Scrip expressed, to exchange such Scrip, at any time on or before the date of expiration of the Scrip, at the principal office in the City of New York of the Agent (or of its successor as Agent), upon surrender thereof together with other Scrip of like tenor in the aggregate calling for a Warrant for the purchase of one or more full shares of Common Stock of the Company, for a Warrant or Warrants representing the right to purchase the number of shares of Common Stock of the Company equal to the highest integral number included in the aggregate of the fractional interests represented by the Scrip certificates so sur-

rendered. For any excess of fractional interests represented by the Scrip certificates so surrendered, over the one or more full shares of Common Stock of the Company called for by the Warrant or Warrants delivered in exchange for such Scrip certificates, the bearer of such Scrip certificates so surrendered shall be entitled to receive until the date of expiration of the Scrip a new Scrip certificate for such excess. The Agent is hereby irrevocably authorized to countersign and to deliver the Warrant or Warrants and Scrip if any required to honor Scrip certificates so surrendered for exchange, and the Company, whenever required by the Agent will supply the Agent with Warrants and Scrip duly executed on behalf of the Company for such purpose.

Seventh. Delivery of certificates for shares issuable upon the exercise of Warrants shall be made free of all taxes in respect of such delivery and the Company will pay the taxes or other duties, if any, in connection with the delivery of such certificates; provided, however, that the Company shall not be required to pay any tax or taxes which may be payable in respect of any transfer involved in the issue or delivery of any certificates for shares in a name other than that of the holder of record of Warrants or of the bearer of Scrip in respect of which such shares are issued,

Eighth. In case any of the Warrants or Scrip shall be mutilated, lost, stolen, or destroyed, the Company may in its discretion issue and the Agent shall countersign and deliver in exchange and substitution for and upon cancellation of the mutilated Warrant or Scrip, or in lieu of and substitution for the Warrant or Scrip lost, stolen, or destroyed, a new Warrant or new Scrip, as the case may be, of like tenor and representing an equivalent right or interest; but only upon receipt of evidence satisfactory to the Company and the Agent of such loss, theft or destruction of such Warrant or Scrip and indemnity, if requested, also satisfactory to them.

Ninth. There have been reserved out of the Company's authorized and unissued shares of Common Stock, a number of shares sufficient to provide for the exercise of the rights of purchase represented by the Warrants and Scrip, and the Transfer Agent for such Common Stock and every subsequent Transfer Agent for any shares of the Company's capital stock



issuable upon the exercise of any of the rights of purchase aforesaid are hereby irrevocably authorized and directed at all times to reserve such number of authorized and unissued shares as shall be requisite for such purpose. The Company will keep on file with the Transfer Agent for the Company's Common Stock and with every subsequent Transfer Agent for any shares of the Company's capital stock issuable upon the exercise of the rights of purchase represented by the Warrants a copy of this Agreement. The Agent under this Agreement is hereby irrevocably authorized to requisition from time to time such Transfer Agent for stock certificates required to honor outstanding Warrants or Scrip. The Company will supply such Transfer Agent with duly executed stock certificates for such purpose and will itself provide or otherwise make available any certificates for fractional shares authorized for the purposes of Section Eleventh of this Agreement. All Warrants and Scrip surrendered in the exercise of the rights thereby evidenced shall be cancelled by the Agent and shall thereafter be delivered to the Company, and such cancelled Warrants, together with any cancelled Scrip in respect of which the rights of purchase represented by the Warrants exchangeable for such Scrip were exercised, shall constitute sufficient evidence of the number of shares of stock which have been issued upon the exercise of such Warrants and Scrip. Promptly after the date of expiration of the Scrip, the Agent shall certify to the Company the total aggregate amount of Scrip then outstanding and thereafter no shares of stock shall be subject to reservation in respect of the Warrants held by the Agent against the exercise of such Scrip, and all such Warrants shall thereupon be cancelled by the Agent and delivered to the Company. Promptly after the date of expiration of the Warrants, the Agent shall certify to the Company the total aggregate amount of Warrants then outstanding, and thereafter no shares of stock shall be subject to reservation in respect of such Warrants.

Tenth. A. The term "warrant price", wherever used in this Agreement, shall mean the price per share at which shares of the Common Stock of the Company shall, at the time be purchasable under any Warrant, determined as hereinafter provided. The term "Common Stock", wherever used in this Agreement, shall mean not only the 1,000,000 shares of Com-

mon Stock of the Company authorized by its certificate of incorporation at the date of the Warrants, but also the shares of stock of any class hereafter authorized which shall not be limited to a fixed sum or percentage in respect to the right of the holders thereof to participate in dividends, or in the distribution of assets upon a voluntary or involuntary liquidation, dissolution or winding up of the Company.

B. The warrant price from and after the issuance of the Warrants, unless and until adjusted as hereinafter provided, shall be \$35 per share. Except in accordance with the provisions of Paragraph C (3) below, the warrant price shall never exceed \$35 per share and, having been reduced at any time or from time to time by adjustment as herein provided, shall never thereafter, except in accordance with the provisions of said Paragraph C (3) below, be increased above the amount to which so reduced, notwithstanding the subsequent issue of shares of Common Stock at a price exceeding such reduced warrant price.

C. For the purpose of this Paragraph C, the term "additional shares" shall mean all shares of Common Stock (in addition to the 552,660 shares to be outstanding at the date of the Warrants) hereafter issued or sold from time to time, whether at a price equal to or above or below the warrant price then in effect. If and whenever, prior to the exercise or expiration of all purchase rights represented by any Warrants at any time outstanding, the Company shall issue or sell any "additional shares" at a price less than the warrant price in effect immediately prior to such issue or sale, the warrant price shall thereupon be adjusted, and if more than one issue or sale shall be made successively adjusted as follows: The adjusted warrant price shall be determined by multiplying 552,660 by the Base Price (the term "Base Price", for the purposes hereof, being deemed to mean \$35 unless and until reduced pursuant to Paragraph D below, and when so reduced, the term Base Price shall mean such reduced price), and adding to the product thereby obtained a sum equal to the aggregate amount of money in dollars, or the fair value in dollars of the property or other consideration, if any, received by the Company upon the issue of all "additional shares" then or at any time theretofore issued, and dividing the resulting total by a divisor consisting of 552,660 increased by the number of all such "ad-

ditional shares", and the resulting quotient shall be the adjusted warrant price per share. Upon each such adjustment of the warrant price, the holder of each Warrant shall thereafter be entitled, instead of purchasing the number of shares specified in his Warrant at the price of \$35 per share, to purchase at the adjusted warrant price per share the number of shares calculated to the nearest one-hundredth of a share, obtained by multiplying the Base Price by the number of shares stated to be purchasable on the face of his Warrant and dividing the product so obtained by the adjusted warrant price per share.

For the purpose of this Paragraph C, the following provisions shall also be applicable:

(1) Except as hereinafter in this sub-paragraph (1) provided, shares of Common Stock issued as a stock dividend shall be treated as "additional shares" but shall be deemed to have been issued without consideration. If at any time the Company shall declare a cash dividend on any of the Common Stock and shall contemporaneously or within three months after the date of payment of such dividend give to the holders thereof the right to subscribe for additional Common Stock at a price which shall net the Company in the aggregate substantially the amount of such cash dividend so declared, such Common Stock so issued in respect of any subscription shall be deemed to have been issued as a stock dividend. The provisions of this sub-paragraph (1) are subject to the following: In case of the issue of stock dividends in an amount not exceeding (taking any shares so issued at the warrant price in effect at the time of such issue) the aggregate amount of the earned surplus of the Company as hereinafter defined, the shares of Common Stock issued as such stock dividend shall be deemed to have been issued for a consideration equal to the warrant price in effect at the time of such issue, and, accordingly, no adjustment shall be made in the warrant price or in the number of shares purchasable under the Warrants in such case.

(2) In case the Company shall at any time issue in exchange for shares of its Common Stock theretofore issued, and outstanding a large number of shares of

Common Stock, the excess number of shares of Common Stock so issued shall be treated as a stock dividend subject to all the provisions of the foregoing subparagraph (1) and Paragraph G below.

(3) In case the Company shall at any time issue in exchange for shares of its Common Stock theretofore issued and outstanding a smaller number of shares of Common Stock, the warrant price then in effect shall be increased and the number of shares of Common Stock purchasable under the Warrants shall be decreased correspondingly, and in all subsequent calculations under this Paragraph C there shall be subtracted from the divisor above mentioned a sum equal to the number of shares by which the issued and outstanding shares shall be reduced upon such exchange.

(4) In case the Company shall in any manner grant or offer any rights to subscribe for or to purchase Common Stock of the Company, or grant or offer any options for the purchase of its Common Stock, any adjustment required to be made in accordance with the provisions hereof in the warrant price and in the number of shares purchasable under the Warrants on account of the issue of such Common Stock shall be made only as of the close of business on the day on which such subscription rights or options shall expire; provided, however, that if such subscription rights or options shall continue in effect for a longer period than six months from the date when the same were granted or offered, any such adjustment shall be made only as of the close of business June 30 and December 31 in each calendar year, in respect of the shares of Common Stock issued during the preceding six months upon the exercise of such rights or options, and as of the close of business on the day upon which such subscription rights or options shall expire, in respect of the shares of Common Stock so issued between the close of business on the preceding June 30 or December 31, as the case may be, and the close of business on the day upon which such subscription rights or options shall expire.

(5) In case the Company shall in any manner issue or sell obligations or stock convertible into or exchangeable for Common Stock of the Company, then all shares



of Common Stock issued upon the conversion of or in exchange for such obligations or stock shall be deemed to be "additional shares", and the amount of money in dollars, or the fair value in dollars of the property or other consideration, if any, received by the Company in consideration for the issue or sale of such obligations or stock shall be deemed to be the consideration received for the issue or sale of such Common Stock; and any adjustment required to be made in accordance with the provisions hereof in the warrant price and in the number of shares purchasable under the Warrants by reason of the issue of such Common Stock shall be made only as of the close of business June 30 and December 31 in each calendar year, in respect of the shares of Common Stock issued during the preceding six months upon the conversion of or in exchange for such obligations or stock, and as of the close of business on the day upon which such right of conversion or exchange shall expire, in respect of the shares of Common Stock so issued between the close of business on the preceding June 30 or December 31, as the case may be, and the close of business on the day upon which such right of conversion or exchange shall expire.

(6) In determining the amount received by the Company upon the issue of "additional shares", such determination shall be made without the deduction of any commission, discount or expenses paid for underwriting or marketing, or in connection with the sale thereof.

(7) In case the Company shall issue any "additional shares" for property or services, the value of such property or services shall, for the purposes hereof, be conclusively determined by the board of directors of the Company.

D. If and whenever, prior to the exercise or expiration of all purchase rights represented by any Warrants at any time issued, the Company shall pay any dividend of cash or assets or make any other distribution of cash or assets to the holders of its Common Stock in an amount exceeding the earned surplus of the Company as hereinafter defined at the time of the declaration of such dividend or distribution, the warrant price shall thereupon be reduced by the amount by which such

dividend or other distribution paid upon one share of Common Stock exceeds the ratable portion of such earned surplus applicable to one share of Common Stock at the time of the payment of such dividends or other distribution; provided, however, that the number of shares of Common Stock purchasable under the Warrants shall not be changed by reason of such dividend or distribution. In case of any reduction of the warrant price pursuant to this Paragraph D, a similar reduction shall be made in the Base Price in all subsequent calculations. The value of any assets (other than cash) distributed to the holders of Common Stock shall, for the purposes of this Paragraph D, be conclusively determined by the board of directors of the Company.

E. If, at any time prior to the exercise or expiration of all purchase rights represented by any Warrants at any time issued, the Company shall be consolidated with or merged into any other corporation or corporations, or shall sell, for securities or partly for cash and partly for securities, all or substantially all of its property, assets, business and good-will, as an entirety, to another corporation or corporations, lawful provision shall be made, as part of the terms of any such consolidation, merger or sale, whereby the holder of each Warrant shall thereafter be entitled to purchase, in lieu of each share of the Common Stock of the Company otherwise purchasable upon the exercise of such Warrant, but at the warrant price in effect at the time of such consolidation, merger or sale (subject to reduction as hereinafter provided) the same kind and amount of securities (including in such term stock of any class or classes) as may be issuable or distributable upon such consolidation, merger or sale with respect to each share of Common Stock; provided, however, that the warrant price shall be reduced by the amount of any cash distributable or payable upon any such consolidation, merger or sale with respect to each share of Common Stock in excess of the ratable portion of the earned surplus of the Company as hereinafter defined at the time of such consolidation, merger or sale applicable to one share of Common Stock. Lawful provision having been so made, from and after such consolidation, merger or sale, all rights of the holders of Warrants shall cease and determine (including the right to purchase shares of the Common Stock and all rights with respect to further ad-

justments of the warrant price and the number of shares of Common Stock purchasable upon the exercise thereof) except the right to purchase during the life of the Warrants such securities as above provided as such securities may from time to time be constituted.

F. If the number of shares of Common Stock purchasable upon the exercise of the Warrants shall be required to be increased or decreased and the warrant price required to be adjusted, or securities other than shares of Common Stock shall become purchasable in lieu of shares of Common Stock upon exercise of the Warrants, then, in each case, the Company shall forthwith:

- (1) file with the Warrant Agent a certificate executed by the President or a Vice-President and attested by the Secretary or an Assistant Secretary of the Company, stating the increased or decreased number of shares of Common Stock, and the adjusted warrant price per share, or specifying the kind and amount of securities, so purchasable under the Warrants, and setting forth in reasonable detail the method of calculation and the facts (including the amount of money in dollars, or the fair value in dollars of the property or other consideration, if any, received or deemed to have been received for any "additional shares" or convertible securities) upon which such calculation is based; and

- (2) cause a notice stating the fact of such increase or decrease in the number of shares so purchasable and the adjusted warrant price per share, or the fact that such kind and amount of securities are purchasable in lieu of each share of Common Stock, to be published at least once a week for two consecutive weeks in a newspaper of general circulation in Denver and a newspaper of general circulation in the Borough of Manhattan, City of New York.

G. The term "earned surplus of the Company" as used herein shall be deemed to mean the aggregate amount of the consolidated net earnings and income of the Company and of its subsidiary companies from the organization of the Company to the date as of which the amount of its earned surplus shall be determined (after deducting (a) interest, including interest on the outstanding Income Mortgage Bonds of the

Company for the years ending March 31, 1937 and March 31, 1938, at the rate of not exceeding 5% per annum to the extent that such interest shall be earned in the calendar years 1936 and 1937, respectively, as provided in the Income Mortgage; and interest from April 1, 1938, at the rate of 5% per annum. (b) all losses and other proper charges against earnings and income, and (c) all dividends or other distributions of cash or assets to stockholders, including all stock dividends in respect of which no adjustment is to be made in respect of the warrant price or in the number of shares purchasable under the Warrants as hereinabove in Paragraph C (1) provided, any shares issued as such stock dividends to be taken for the purpose of such deduction at an amount equal to the warrant price in effect at the time such shares were issued), but excluding all stock dividends in respect of which an adjustment is to be made in respect of the warrant price or in the number of shares purchasable under the Warrants as hereinabove in Paragraph C provided, and excluding all dividends of cash or assets or other distributions of cash or assets to stockholders in respect of which an adjustment is to be made in respect of the warrant price as hereinabove in Paragraph D provided. The term "subsidiary company" shall mean any corporation, ninety per cent. or more of whose capital stock entitled to vote for the election of directors shall be owned by the Company, or by one or more of its subsidiary companies, or by the Company and one or more of its subsidiary companies.

Eleventh. If there shall be any adjustment of the warrant price pursuant to the provisions of Section Tenth of this Agreement or any increase or decrease in the number of shares of the Company's authorized capital stock as constituted July 1, 1936, whereby any fraction or fractions of a share shall become purchasable upon the exercise of then outstanding Warrants, the Company shall not be required upon the exercise of such Warrants to issue certificates representing such fraction or fractions of a share, but may issue in lieu thereof one or more non-dividend bearing and non-voting certificates, in such form or forms as shall be approved by its board of directors, each representing a fractional right to receive from the Company a certificate representing a full share of stock when presented with other like certificates representing other fractional rights in the aggregate equal to the right to receive at



least one full share of stock. Such certificates may contain such terms and conditions as shall be fixed by the board of directors of the Company and may become void and of no effect after a reasonable period, not less than three years from the date of issuance, to be determined by said board of directors and specified in such certificates.

Twelfth. Nothing contained in this Agreement or in any of the Warrants or Scrip shall be construed as conferring upon the holders thereof the right to vote or to consent or to receive notice as stockholders in respect of the meetings of stockholders or the election of directors of the Company or any other matter, or any rights whatsoever as stockholders of the Company; provided, however, that in the event that a meeting of stockholders shall be called to consider and take action on a proposal for the voluntary dissolution of the Company, other than in connection with a consolidation, merger or sale of all, or substantially all, of its property, assets, business and goodwill as an entirety, then and in that event the Company shall cause a notice thereof to be published at least once a week for two consecutive weeks in a newspaper of general circulation in Denver and in a newspaper of general circulation in the Borough of Manhattan, City of New York, such publication to be completed at least twenty days prior to the date fixed as a record date or the date of closing the transfer books for the determination of the stockholders entitled to vote at such meeting. If such notice shall have been so given and if such a voluntary dissolution shall be authorized at such meeting or any adjournment thereof, then from and after the date on which such voluntary dissolution shall have been duly authorized by the stockholders, the purchase rights represented by the Warrants and all other rights with respect thereto shall cease and determine. Within 7 days after the date of the first publication of any notice pursuant to the provisions of this Section Twelfth, the Company will also cause a copy thereof to be mailed, postage prepaid, to each holder of record of Warrants at such address as appears upon the transfer books for such Warrants; but failure to mail such notice by imperfection or defect therein shall not affect the sufficiency for all purposes of this Agreement of notice given by publication in compliance with this Section Twelfth.

Thirteenth. The Agent promptly shall account to the Com-

pany with respect to Warrants exercised and concurrently pay to the Company all moneys received by the Agent for the purchase of shares of the Company's stock through the exercise of such Warrants. Income Mortgage Bonds of the Company received by the Agent upon the exercise of Warrants shall be delivered also by the Agent to the Company from time to time, at least quarter-annually. The Company hereby covenants and agrees with the Agent, for the benefit of the owners and holders of the Warrants and Scrip, to pay over the proceeds received by the Company from the exercise of the Warrants to the Corporate Trustee under the Company's Income Mortgage securing its outstanding Income Mortgage Bonds, to be applied by said Trustee to the purchase, on calls for tenders, of such Income Mortgage Bonds at prices not exceeding the principal amount thereof together with any unpaid cumulative interest thereon, or, to the extent that such purchases cannot be made, to the redemption by lot of such Income Mortgage Bonds at the principal amount thereof together with any unpaid cumulative interest thereon. All Income Mortgage Bonds delivered to the Company as aforesaid or so purchased or redeemed with the proceeds of the Warrants will be cancelled and no Income Mortgage Bonds will be issued in lieu thereof, but the Agent shall be under no duty to ascertain what disposition is made by the Company of such Income Mortgage Bonds nor be under any duty as to the application of the proceeds of the Warrants so received by the Company.

Fourteenth. Any corporation into which the Agent may be merged or with which it may be consolidated, or any corporation resulting from any merger or consolidation to which the Agent may be a party, shall be the successor Agent under this Agreement without the execution or filing of any paper or any further act upon the part of the parties hereto. The Agent may resign and be discharged from its duties under this Agreement by giving to the Company notice in writing, and to the holders of the Warrants and Scrip notice by publication of such resignation, specifying a date when such resignation shall take effect, which notice shall be published at least once a week for two consecutive weeks in a newspaper of general circulation in Denver and in a newspaper of general circulation in the Borough of Manhattan, City of New York, prior to the date so specified. Subject to its right to compensation, reim-

bursement and indemnity, as provided for in this Agreement, the Agent may be removed at any time by an instrument or concurrent instruments in writing filed with the Agent and executed by the holders of Warrants representing the right to purchase at least 50% of the aggregate number of shares of Common Stock of the Company purchasable upon the exercise of the Warrants then outstanding. In case of the resignation or removal of the Agent as aforesaid, a successor may be appointed by the Company by a certificate of the Company, executed by the President or a Vice-President and attested by the Secretary or an Assistant Secretary of the Company and filed with such successor, certifying that such successor has been so designated the Agent under this Agreement by the board of directors of the Company, and thereupon such successor, without any further act upon the part of the parties hereto, shall become and be the Agent under this Agreement; but unless or until such successor is appointed by the Company as aforesaid the holders of Warrants representing the right to purchase at least 25% of the aggregate number of shares of Common Stock of the Company purchasable upon the exercise of the Warrants then outstanding, by instrument or concurrent instruments in writing, may appoint such successor, who, upon receipt of such instrument or instruments of appointment, shall in like manner as a successor Agent appointed by the Company become and be the Agent under this Agreement. Any successor so appointed by the holders of Warrants shall, nevertheless, immediately and without further act be superseded by a successor appointed by the Company in the manner hereinabove provided; During any vacancy in the office of Agent under this Agreement, however, all rights represented by the Warrants or Scrip may be exercised at the principal office in Denver of the Company.

Fifteenth. The Agent accepts its appointment as Agent under this Agreement subject to the following terms and conditions:

- (a) The Agent shall not be responsible for, or liable in respect of, and makes no representations as to, the recitals contained herein or the validity or enforceability hereof or of the Warrants or Scrip or of any securities issuable upon the exercise of Warrants.
- (b) The Agent shall be entitled to receive reason-

able compensation and reimbursement for reasonable expenses and liabilities incurred hereunder, to employ attorneys and agents, and to consult with legal counsel (who may be counsel for the Company) in connection with anything which it may do under this Agreement, all at the expense of the Company. For any action taken or omitted in good faith upon advice of such legal counsel the Agent shall not be liable.

(c) The Agent shall not be responsible for any act or omission of any of its agents or attorneys who shall have been selected by it in good faith and shall incur no liability whatsoever for anything done or omitted hereunder, or for anything whatsoever in connection herewith, except for its own wilful misconduct or gross negligence.

(d) As to any matter, fact or thing which it may be necessary or advisable to establish in connection with the Agent's taking any action hereunder, the Agent shall be fully protected in relying upon a certificate of the Company executed by the President or a Vice-President and attested by the Secretary or an Assistant Secretary of the Company, certifying as to such matter, fact or thing. The Agent may accept a certificate signed by the Secretary or an Assistant Secretary of the Company, under its corporate seal, as conclusive evidence that any resolution has been duly adopted by the board of directors of the Company, and the Agent shall be fully protected in relying thereon.

(e) The Agent may buy, sell, own, hold and deal in Warrants and Scrip and in any securities of the Company and shall have the same rights in respect thereof as though not a party to this Agreement.

(f) The Agent shall be under no duty to make any investigation or inquiry as to the statements contained in any certificate filed pursuant to Paragraph F(1) of Section Tenth, but may accept such certificate as conclusive evidence of the statements therein contained, and shall be fully protected in relying thereon; provided, however, that the Agent, in its discretion, may and upon the written request of the holders of Warrants representing the right to purchase at least 25% of the aggregate number of shares of Common Stock



of the Company purchasable upon the exercise of the Warrants then outstanding and upon being indemnified to its satisfaction, shall cause an investigation to be made of the accuracy of any such statement, in such manner as, in the Agent's sole discretion, the Agent shall deem advisable. The Agent shall also be entitled to receive from the Company reimbursement for the reasonable expenses and liabilities incurred by the Agent in connection with any reasonable investigation made by it pursuant to this Paragraph (f).

(g) The Agent shall be under no obligation to institute, appear in, conduct, or defend any suit or litigation or to take any action by reason of any matter or thing connected with this Agreement or by reason of being Agent hereunder, which in its opinion will be likely to involve expense or liability, until the amount of such expense shall be advanced and until it shall be indemnified as often as may be required to its full satisfaction for all costs and liabilities of every kind which in its opinion such action or proceeding may involve.

Sixteenth. Any of the rights conferred upon the holders of any Warrants or Scrip by the terms of such Warrants or Scrip or of this Agreement may be enforced by the respective holders of such Warrants or Scrip by appropriate proceedings at law or in equity or otherwise, without prejudice to the right which is hereby conferred upon the Agent in its own name to enforce each and all of the provisions contained in this Agreement for the benefit of the holders of the Warrants and Scrip from time to time outstanding hereunder. All rights of action under this Agreement or under any of the Warrants or Scrip may be enforced by the Agent without the possession of any of the Warrants or Scrip or the production thereof at any trial or other proceeding relative thereto, and any such suit or proceeding instituted by the Agent shall be brought in its name as Agent, and any recovery of judgment shall be for the ratable benefit of the holders of the Warrants and Scrip, as their respective rights or interest may appear. The Company covenants and agrees to indemnify and hold harmless the Agent, in so far as it acts under this Agreement on behalf of the holders of outstanding Warrants or Scrip, from any liability which the Agent may or might incur by reason of

any action taken or not taken by it in good faith pursuant to the provisions of this Agreement.

Seventeenth. Forthwith upon the appointment of any Transfer Agent for the Common Stock of the Company or of any subsequent Transfer Agent for shares of such Common Stock or other shares of the Company's capital stock issuable upon the exercise of the rights of purchase represented by the Warrants, the Company will file with the Agent under this Agreement a statement setting forth the name and address of such Transfer Agent. Any notice or demand to be addressed to the Company by the Agent under this Agreement shall be sufficiently given or made when deposited, enclosed in a postpaid envelope in a post office letter box in the City of New York or elsewhere, directed (until some other address is filed in writing by the Company with the Agent) to The Colorado Fuel and Iron Corporation, Denver, Colorado.

In Witness Whereof, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

THE COLORADO FUEL AND  
IRON CORPORATION,  
By Arthur Roeder, President.

(Corporate Seal)

Attest:

D. C. McGrew, Secretary.

THE CHASE NATIONAL BANK  
OF THE CITY OF NEW YORK,  
As Warrant Agent,

(Corporate Seal)

By A. E. Bates, Vice-President.

Attest:

J. R. Thompson, Assistant Cashier.

[Verifications omitted.]

## Exhibit K.

## Plan of Reorganization of

The Colorado Fuel and Iron Company  
(and The Colorado Industrial Company)

Dated March 1, 1935

Notice That the New Securities Under the Plan of  
Reorganization Are Ready for Distribution.

To the holders of:

First Mortgage Five Per Cent, Thirty Year Bonds, Due  
August 1, 1934, of

The Colorado Industrial Company, and

8% Cumulative Preferred Stock and Common Stock of  
The Colorado Fuel and Iron Company.

The above mentioned Plan of Reorganization was confirmed by the District Court of the United States for the District of Colorado by order dated April 25, 1936, entered in the proceedings therein pending entitled "In the Matter of The Colorado Fuel and Iron Company and Another, Colorado corporations, Debtors, In Proceedings for Reorganization, Consolidated Cause No. 8081". By order dated June 20, 1936, said Court directed The Colorado Fuel and Iron Corporation (a Colorado corporation which has been organized to be the New Company provided for in the Plan and which has acquired the properties formerly owned by The Colorado Fuel and Iron Company) to issue its 5% Income Mortgage Bonds, Common Stock and Warrants to purchase Common Stock in accordance with the provisions of the Plan.

Such New Securities Are Now Ready for Distribution.

In order to obtain the new securities to which they are entitled under the Plan, holders of said First Mortgage Bonds of the Colorado Industrial Company and holders of Preferred Stock and Common Stock of The Colorado Fuel and Iron Company must surrender their bonds or stock certificates, accompanied by the prescribed form of transmittal letter mentioned below, to either

The Chase National Bank of the City of New York,  
11 Broad Street, New York, N. Y.

or

International Trust Company,  
Denver, Colorado.

which have been appointed Distributing Agents for the new securities.

Holders of said First Mortgage Bonds of The Colorado Industrial Company are entitled to receive under the Plan, for each \$1,000 principal amount of such Bonds, upon surrender thereof (together with interest coupons thereon due August 1, 1933, February 1, 1934 and August 1, 1934):

- (a) \$400 principal amount of 5% Income Mortgage Bonds due April 1, 1970, of the New Company; and
- (b) 20 shares of Common Stock without par value of the New Company.

Coupons appurtenant to First Mortgage Bonds of The Colorado Industrial Company, which matured on or before February 1, 1933, but which have not yet been collected, will be paid upon presentation thereof at the office of The New York Trust Company, 100 Broadway, New York, N. Y., paying agent for such coupons.

Holders of 8% Cumulative Preferred Stock of The Colorado Fuel and Iron Company are entitled to receive under the Plan, for each share of such stock:

Warrants to purchase, at any time on or before February 1, 1950, three shares of Common Stock of the New Company at \$35 per share.

Holders of Common Stock of The Colorado Fuel and Iron Company are entitled to receive under the Plan, for each share of such stock:

Warrants to purchase, at any time on or before February 1, 1950, three-fourths of a share of Common Stock of the New Company at \$35 per share.

Scrip certificates exchangeable in amounts aggregating Warrants for one full share or multiples thereof, will be delivered for fractional interests.



The 5% Income Mortgage Bonds and the Common Stock of the New Company have been listed on the New York Stock Exchange. Application has been made to list the Warrants on the New York Curb Exchange.

All First Mortgage Bonds of The Colorado Industrial Company and all certificates for Preferred Stock and Common Stock of The Colorado Fuel and Iron Company surrendered for exchange must be accompanied by the prescribed form of transmittal letter. Copies of such form of transmittal letter are being mailed to all known holders of such securities. Additional copies may be obtained upon application to either of said Distributing Agents or to the undersigned.

J. & W. SELIGMAN & CO.,  
Reorganization Managers.

September 1, 1936.

54 Wall Street, New York, N. Y.

Exhibit L

The Colorado Fuel and Iron Company

And

The Colorado Industrial Company

And

Arthur Roeder, as Trustee

And

The New York Trust Company, as Trustee

To

The Colorado Fuel and Iron Corporation

Indenture and Bill of Sale.

Dated as of July 1, 1936.

Indenture and Bill of Sale, dated as of July 1, 1936, between The Colorado Fuel and Iron Company, a Colorado corporation, (hereinafter called the Fuel and Iron Company), party of the first part, The Colorado Industrial Company, a Colorado corporation (herein-

after called the Industrial Company), party of the second part, Arthur Roeder, as Trustee of the estates of the Fuel and Iron Company and the Industrial Company, appointed and acting as hereinafter in the second recital hereof set forth, party of the third part, The New York Trust Company, a New York corporation, as Trustee, acting as hereinafter in the fourth recital hereof set forth, party of the fourth part, and The Colorado Fuel and Iron Corporation, a Colorado corporation (hereinafter called the New Company), party of the fifth part.

Whereas on August 1, 1934, the Fuel and Iron Company and the Industrial Company (a wholly owned subsidiary of the Fuel and Iron Company), filed petitions for reorganization under Section 77B of the Bankruptcy Act in the United States District Court for the District of Colorado, which petitions were approved by orders duly made by said Court and entered in the proceedings (hereinafter sometimes called the Reorganization Proceedings) therein pending entitled: "In the Matter of The Colorado Fuel and Iron Company and Another, Colorado corporations, Debtors; In Proceedings for Reorganization; Consolidated Cause No. 8081"; and

Whereas said Arthur Roeder (hereinafter called the Trustee) has been appointed and is acting as Trustee of the estates of the Fuel and Iron Company and the Industrial Company under orders duly made and entered in the Reorganization Proceedings; and

Whereas the "Plan of Reorganization of The Colorado Fuel and Iron Company (and the Colorado Industrial Company), dated March 1, 1935" (hereinafter called the Plan), duly proposed by the Fuel and Iron Company and the Industrial Company at a hearing held in the Reorganization Proceedings on April 29, 1935, was duly confirmed by an order (hereinafter called the Confirmation Order) duly made and entered in said proceedings on April 25, 1936, and, by an order (hereinafter called the Transfer Order) duly made and entered in the Reorganization Proceedings on June 20, 1936, the transfer to the New Company of the assets of the Fuel and Iron Company and the Industrial Company pursuant to the Plan and the other proceedings necessary to carry the Plan into effect were authorized and directed; and

Whereas said The New York Trust Company (hereinafter called the Industrial Trustee) is now acting as trustee under an Indenture dated August 1, 1904 (known as the First Mortgage), between the Industrial Company and New York Security and Trust Company, as Trustee, as amended and supplemented by an Indenture dated August 1, 1904, and four Supplemental Mortgages dated June 5, 1907, June 19, 1913, September 10, 1924, and October 27, 1925, respectively, between the Industrial Company and said New York Security and Trust Company or the Industrial Trustee, and by an Indenture dated April 12, 1932, between The Rocky Mountain Coal and Iron Company (a wholly owned subsidiary of the Industrial Company) and the Industrial Trustee (said First Mortgage, as so amended and supplemented, being hereinafter referred to as the First Mortgage); and

Whereas, pursuant to the Transfer Order, the Fuel and Iron Company, the Industrial Company, the Trustee and the Industrial Trustee hereinafter sometimes referred to collectively as the Grantors) were authorized and directed to assign, transfer, convey and deliver to the New Company, by an instrument of conveyance in the form hereof, which was approved by the Transfer Order, all their respective right, title and interest in and to all the assets and properties of every nature and description, tangible and intangible, real, personal or mixed, and wheresoever situated, of the Fuel and Iron Company and the Industrial Company, of the Industrial Trustee, as trustee under the First Mortgage, and of the estates of the Fuel and Iron Company and the Industrial Company and the Trustee, including the rights, privileges, good-will and, in so far as permitted by law, the franchises of the Fuel and Iron Company and the Industrial Company; and

Whereas the execution and delivery of this Indenture by and on behalf of the New Company has been duly authorized by its Board of Directors, and the New Company has in all respects complied with the provisions of the Confirmation Order, the Transfer Order and the Plan thereby required to be performed by it prior to the execution and delivery of this Indenture;

Now, Therefore, this Indenture witnesseth that, in consideration of the premises, and of the assumption by the New Company of the obligations and liabilities which by the provisions of the Plan and in conformity with the Transfer Order

the New Company is required to perform or assume, and of the issuance by the New Company of 552,660 shares of Common Stock without par value of the New Company and Warrants (and scrip for Warrants) to purchase 315,379 shares of such Common Stock, pursuant to the Transfer Order and the Plan, and in consideration of other good and valuable consideration paid or to be paid by the New Company, the sufficiency of which is hereby acknowledged by the Grantors, the Fuel and Iron Company, the Industrial Company, the Trustee and the Industrial Trustee (the Grantors herein), in order to carry into effect the Plan and to carry out the Transfer Order, have assigned, transferred, conveyed and delivered, and by these presents do assign, transfer, convey, deliver, give, grant, bargain, sell, alien, remise, release, quitclaim, set over and confirm unto The Colorado Fuel and Iron Corporation, a Colorado corporation (the New Company named above), its successors and assigns, all their respective right, title and interest in and to all the assets and properties of every nature and description, tangible and intangible, real, personal or mixed, wheresoever situated, and whether in the possession of the Grantors or any of them, or in transit, or in the possession of any other person, firm or corporation, of the Fuel and Iron Company and the Industrial Company, of the Industrial Trustee, as trustee under the aforesaid First Mortgage, and of the estates of the Fuel and Iron Company, the Industrial Company and the Trustee, except as hereinafter otherwise expressly provided, including, but without intending thereby to limit the generality of the foregoing description, the following:

1. All ore, coal, coke, coke by-products, limestone, steel, iron, lumber, fuel, oil and other materials and supplies, finished and semi-finished products of iron and steel, work in process, inventory, railroad equipment, wagons, cars, trucks, automobiles, engines, motors, parts, dies, patterns, rolls, tools and other equipment, drawings, furniture, office equipment and supplies, and all other tangible personal property, goods and chattels;

2. All claims, demands, rights, choses in action, bills and notes, accounts receivable, credits, debts, bills, discounts and deferred items, and the proceeds thereof, all policies of insurance and fidelity and other bonds and all rights and claims thereunder, including the cash surrender value thereof, all



muniments of title to and evidences of ownership of the properties and assets of the Grantors hereby assigned, transferred and conveyed, or intended so to be, and all books of account and records of the Fuel and Iron Company, the Industrial Company and the Trustee; provided, however, that the Trustee and his authorized representatives shall have access to said books of account for the purpose of closing the accounts of the Trustee and as may be required by him for completing and closing the affairs of the Reorganization Proceedings;

3. All cash in banks remaining after payment of all outstanding checks drawn against the same, and all cash on hand, including any and all balances of funds belonging to the Grantors or any of them in the possession of any of their agents or employees;

4. All stocks, bonds and other securities and investments, including 1,000 shares, being all the issued and outstanding shares of stock, of The Colorado & Wyoming Railway Company, a Colorado corporation, and \$4,500,000 principal amount of First Mortgage 4% Bonds, due March 1, 1953, of said Company;

5. All contracts, agreements, licenses, options and other arrangements, whether for the purchase of materials, supplies or equipment, or for the manufacture, sale or distribution of the products of the Fuel and Iron Company or the Industrial Company, or for any purpose whatsoever, not fully performed by all of the parties thereto at the date hereof, and all monies due or to become due under said contracts;

6. All patents, patent rights, copyrights, trade-marks, trade names and applications for any and all thereof, all processes and formulae, all designs and drawings, and all licenses and shop rights under any patents, patent rights, copyrights, trade-marks and trade names, and applications for any and all thereof;

7. All moneys to be realized on account of any right of the Fuel and Iron Company, the Industrial Company and the Trustee to any refund on account of any taxes paid by them or any of them;

8. All rights, privileges, good-will and trade connections of the Fuel and Iron Company and the Industrial Company,

including the right to use the names "The Colorado Fuel and Iron Company", "The Colorado Industrial Company" and any combination thereof, in so far as the Fuel and Iron Company, the Industrial Company and the Trustee have such right, and, in so far as permitted by law, the franchises of the Fuel and Iron Company and the Industrial Company;

9. All real property and real estate and all right, title, interest and estate of the Grantors of every kind and description whatsoever in, or in any way related to, real property or real estate, wheresoever situated, including, but not limited to, fees, leaseholds, mining and mineral rights, chattels real, easements, appurtenances and servitudes of every kind whatsoever;

10. All buildings, plants, structures, fixtures, mines, improvements and appurtenances now erected on, attached to or connected with any such real property or real estate, including all equipment, machinery, tools, appliances and implements belonging thereto; and

11. All other assets and properties of every kind and description, wheresoever situated, belonging to the Grantors or included in the estate of the Fuel and Iron Company, the Industrial Company or the Trustee.

To have and to hold all the assets and properties hereinabove described and hereby assigned, transferred and conveyed, and delivered, or intended so to be, unto the New Company, its successors and assigns, forever, free, clear and discharged of and from any and all claims, liens, rights, interests, equities or equitable or statutory rights of redemption of the Fuel and Iron Company and the Industrial Company, their creditors and stockholders, and of the Industrial Trustee, as trustee under the First Mortgage, and of each of the parties to the Reorganization Proceedings and of the Trustee and of all persons, firms and corporations, claiming by, through or under them, or any of them, in or to said assets and properties and every part and parcel thereof, subject, however, (a) as to any of the properties or assets hereby transferred, assigned and conveyed, or intended so to be, which are described therein or are subject thereto, to the lien of the General Mortgage, dated February 1, 1893, between the Fuel and Iron Company and Central Trust Company of New York

(now Central Hanover Bank and Trust Company), as Trustee, (b) to each and all of the terms, provisions, obligations and conditions of the Confirmation Order, of the Transfer Order, and of the Plan, which are hereby specifically accepted by the New Company for itself, its successors and assigns, and (c) to the rights and powers of the United States District Court for the District of Colorado under the Confirmation Order, the Transfer Order and the Plan and pursuant to the provisions of Section 77B of the Federal Bankruptcy Act, as amended.

The parties hereto further mutually covenant and agree as follows:

Section 1. This Indenture is not intended to deprive the Trustee of any rights of defense, set-off or counter-claim which he may have against any creditors of the Fuel and Iron Company or the Industrial Company, and, to the extent that such rights are available to the Trustee, the claims upon which such rights rest are not included in the assignments, transfers and conveyances made by this Indenture.

Section 2. This Indenture is intended to convey to the New Company only the right, title and interest of the Grantors in and to the property covered hereby, and no warranty of any character, either express or implied, is included herein.

Section 3. No personal liability, whatsoever, in favor of the New Company or of any subsequent transferee of the assets and properties covered hereby, or any part thereof, shall attach to or be incurred by the Trustee or the Industrial Trustee or by any officer or director of the Fuel and Iron Company or the Industrial Company or Industrial Trustee, or any of them, under or by reason of this Indenture or the recitals herein contained or any deeds, conveyances, bills of sale, endorsements, checks or other instruments of assignment, transfer and conveyance for the purpose of making effective the assignment, transfer and conveyance of said assets and properties; all such personal liability, if any, being hereby expressly waived and released.

Section 4. The New Company will be liable and responsible for taxes, if any, payable on, or in respect of, the assignment, transfer and conveyance of any of the assets and properties.

covered hereby, in so far as such taxes, if any, are not paid by the Trustee at or prior to the delivery hereof.

Section 5. The Grantors hereby severally constitute and appoint the New Company, its successors and assigns, the true and lawful attorney or attorneys of the Grantors and each of them, with full power of substitution, for them and each of them and in the name and stead of each of them, or otherwise, but on behalf and for the benefit of the New Company, its successors and assigns, to demand and receive from time to time any and all assets and properties, tangible and intangible, hereby assigned, transferred and conveyed, or intended so to be, and to give receipts and releases for and in respect of the same or any part thereof, and from time to time to institute and prosecute in the name of the Grantors, or any of them, or otherwise, but at the expense and for the benefit of the New Company, its successors and assigns, any and all proceedings at law, in equity or otherwise, which the New Company, its successors or assigns, may deem proper in order to collect, assert or enforce any claim, right or title of any kind in and to the assets and properties hereby assigned, transferred and conveyed, or intended so to be, and to defend and compromise any and all actions, suits or proceedings, in respect of any of said assets or properties, and to do all such acts and things in relation thereto as the New Company, its successors or assigns, shall deem desirable; the Grantors hereby declaring that the appointment hereby made and the powers hereby granted are coupled with an interest and are and shall be irrevocable by the Grantors or any of them or by the dissolution of the corporate Grantors or the discharge of the Trustee or in any other manner or for any reason.

Section 6. The Fuel and Iron Company, the Industrial Company and the Trustee further authorize the New Company, its successors and assigns, to receive and open all mail, telegrams and other communications and all express and other packages addressed to the Fuel and Iron Company, the Industrial Company or the Trustee and to retain the same in so far as they relate to the properties and assets hereby assigned, transferred and conveyed, or intended so to be, the New Company hereby agreeing to forward to the Trustee with reasonable dispatch all mail, telegrams, communications



and express or other packages so addressed but not relating to said property or assets. The foregoing shall constitute full authorization to the postal authorities, all telegraph and express companies and all other persons to make delivery of such items to the New Company, its successors and assigns.

Section 7. The Grantors and each of them will, whenever and as often as requested so to do by the New Company, its successors or assigns, execute, acknowledge and deliver or cause to be executed, acknowledged and delivered, at the expense of the New Company, any and all such other and further assignments (including assignments of all patents herein conveyed or intended so to be), transfers, conveyances (including deeds sufficient in form to convey to the New Company all real property, real estate or any part or parcel thereof or any interest therein hereby conveyed or intended so to be), confirmations, powers of attorney, and any other papers and documents or instruments of further assurance, approvals and consents, whether by the Fuel and Iron Company, the Industrial Company, the Industrial Trustee, the Trustee or others, as the New Company, its successors and assigns, may hereafter deem necessary or proper in order to keep, insure and perfect the assignment, transfer and conveyance to the New Company, its successors and assigns, of all the right, title and interest of the Grantors in and to any and all of the assets, properties, business and good will hereby assigned, transferred and conveyed, or intended so to be.

Section 8. The New Company agrees that it will issue and deliver, as provided in the Transfer Order and as further consideration for the assets and properties hereby assigned, transferred, conveyed and delivered, \$11,053,200 principal amount of 5% Income Mortgage Bonds of the New Company, described in the Plan, as soon as the holder of all the issued and outstanding shares of Common Stock of the New Company shall have voted such shares, at a meeting of shareholders of the New Company to be called for the purpose, to authorize and consent to the creation by the Board of Directors of the New Company of an Income Mortgage in the form approved by the Transfer Order to secure said Income Mortgage Bonds.

Section 9. The New Company hereby assumes the performance of all obligations by the Plan and by the Transfer

Order provided to be or to be deemed to be assumed by the New Company, including, without limiting the generality of the foregoing, all liability for the payment of (a) all claims specified in clauses (1) to (6), inclusive, of Article Three of the Transfer Order, and (b) all amounts which may hereafter be allowed by the United States District Court for the District of Colorado as compensation for services rendered or as reimbursement for expenditures incurred in connection with the Reorganization Proceedings and the Plan, by the Trustee, officers, parties in interest, depositaries, the Reorganization Managers, the Committees or their representatives, creditors or stockholders, and the attorneys or agents of any of the foregoing and of the Fuel and Iron Company and the Industrial Company, which claims and allowances the New Company will pay in cash in full.

Section 10. This Indenture may be executed in any number of counterparts, each of which so executed shall be deemed to be an original, but such counterparts shall together constitute but one and the same instrument.

In Witness Whereof, the Fuel and Iron Company, the Industrial Company, the Industrial Trustee and the New Company have caused this instrument to be executed in their respective corporate names by their respective presidents or one of their respective vice-presidents, and their respective corporate seals to be hereunto affixed and attested by their respective secretaries or one of their respective assistant secretaries, and the Trustee has hereunto set his hand and seal, all as of the day and year first above written.

THE COLORADO FUEL AND IRON COMPANY,

By THOMAS AURELIUS,  
Vice-President.

(Corporate Seal).

Attest:

D. C. McGREW,  
Secretary.

Signed, sealed and delivered by The Colorado Fuel and Iron Company in the presence of:

FRED FARRAR

A. M. RIDDLE

Attesting Witnesses.

## THE COLORADO INDUSTRIAL COMPANY,

By S. G. PIERSON,  
Vice-President.

(Corporate Seal)

Attest:

D. C. MCGREW,  
Secretary.

Signed, sealed and delivered by The Colorado Industrial Company in the presence of:

FRED FARRAR

A. M. RIDDLE

Attesting Witnesses.

ARTHUR ROEDER (L.S.)

(As Trustee in the Reorganization Proceedings referred to in the foregoing Indenture, and not individually).

Signed, sealed and delivered by Arthur Roeder in the presence of:

FRED FARRAR

A. M. RIDDLE

Attesting Witnesses.

## THE NEW YORK TRUST COMPANY,

(As Trustee under the First Mortgage referred to in the foregoing Indenture, and not individually).

By A. C. DOWNING,  
Vice-President.

(Corporate Seal).

Attest:

R. P. MERRICK,  
Assistant Secretary.

Signed, sealed and delivered by The New York Trust Company in the presence of:

ALAN M. COOPER,

F. M. AUKAMP,

Attesting Witnesses.

THE COLORADO FUEL AND IRON CORPORATION,  
By NEWELL H. ORR,  
Vice-President.

(Corporate Seal).

Attest:

TERRELL C. DRINKWATER,  
Assistant Secretary.

Signed, sealed and delivered by The Colorado Fuel and Iron Corporation in the presence of:

FRED FARRAR,  
A. M. RIDDLE,  
Attesting Witnesses.

[Verifications omitted.]

Exhibit M.

In the District Court of the United States  
For the District of Colorado.

In the Matter

of

The Colorado Fuel and Iron Company, and Another, Colorado corporations,

Debtors.

In Proceedings for  
Reorganization  
Consolidated Cause  
No. 8081.

Final Report  
of

Arthur Roeder, as Trustee of the Estates of  
The Colorado Fuel and Iron Company and  
The Colorado Industrial Company.

To the Honorable J. Foster Symes, Judge of the United States District Court for the District of Colorado:

Arthur Roeder, Trustee of the estates of The Colorado Fuel and Iron Company and The Colorado Industrial Company, Debtors in the above entitled proceeding, respectfully submits this Final Report of his administration of the estates of said debtors.



In order that this Final Report may be more clearly understood, said Trustee respectfully directs the attention of the Court to certain matters of record:

That the books of the Receiver in the prior receivership proceedings of The Colorado Fuel and Iron Company were closed as of midnight July 31, 1934, and under date of September 18, 1934, Price, Waterhouse & Company, certified public accountants, rendered a report of their audit of said books, which report was filed in this cause on October 31, 1934, as Schedule Exhibit 13. This showed the closing entries of the Receiver for the period and the opening entries of the reorganization period.

Thereafter and from month to month the Trustee rendered to this Court a report showing his receipts and disbursements for each month of the period of the reorganization. These reports are a matter of record in this cause.

That on March 12, 1936, the Trustee filed a report entitled "Interim Report", which included, among other things, profit and loss statement for the receivership period; a profit and loss statement of the Trustee for the period August 1, 1934 to July 31, 1935; a profit and loss statement of the Trustee from August 1, 1935 to December 31, 1935; and a consolidated balance sheet of The Colorado Fuel and Iron Company and its subsidiaries as of December 31, 1935.

That on February 18, 1937, the Trustee filed in this cause a report entitled "Second Interim Report", dated February 16, 1937, in which the Trustee reported that pursuant to the order of confirmation entered herein on April 25, 1936, and the order of Court directing the transfer of assets unto The Colorado Fuel and Iron Corporation (the new corporation) entered herein June 20, 1936, all properties and assets of The Colorado Fuel and Iron Company and The Colorado Industrial Company and of the Trustee and The New York Trust Company, as Trustee, under the mortgage, or deed of trust, of The Colorado Industrial Company dated August 1, 1904, and all supplements thereto, had been sold, conveyed, assigned and transferred unto The Colorado Fuel and Iron Corporation as of July 1, 1936, and that since said date the said new corporation has conducted, managed and operated said properties and the business relating thereto. Accompanying said

Second Interim Report and attached thereto, was a report of Price, Waterhouse & Company, certified public accountants, dated October 22, 1936, including a summary of transactions of the Trustee; balance sheets as of June 30, 1936; a statement of profit and loss for the period August 1, 1934 to June 30, 1936; and various other financial data with respect to The Colorado Fuel and Iron Company and its subsidiaries and the operations and transactions of the Trustee. This report indicated the closing entries of the books of Arthur Roeder as Trustee, except for the payment of such additional amounts as might thereafter be ordered to be paid in the reorganization proceedings, including the allowance of fees and expenses of parties in interest and for counsel in these proceedings and the adjustment and payment of taxes accrued against the Trustee, and certain other deferred matters.

The Trustee in that report stated that he could not at that time render a final report pending the determination of various deferred matters and the execution and delivery of numerous formal deeds of conveyance and other instruments.

Subsequent to the date upon which said Second Interim Report was filed and on March 25, 1937, this Court entered an order directing the payment of certain fees and expenses allowed to parties in interest and counsel, etc., in the reorganization proceedings. From this order the General Mortgage Bondholders' Protective Committee and Sullivan & Cromwell, their counsel, appealed to the Circuit Court of Appeals for the Tenth Circuit. Pending said appeal, however, The Colorado Fuel and Iron Corporation, the new corporation, in accordance with the order of Court, paid and discharged all of the amounts allowed as fees and expenses by said order of March 25, 1937, except the amounts allowed to General Bondholders' Protective Committee and Sullivan & Cromwell, and on July 8, 1937, The Colorado Fuel and Iron Corporation filed in these proceedings a report showing compliance with said order by the payment of the aggregate sum of \$200,616.75 for fees and \$22,287.61 as reimbursement for expenses to claimants named in said order.

In due course the appeal of Sullivan & Cromwell, being Cause No. 1582 in the United States Circuit Court of Appeals for the Tenth Circuit, and the appeal of Thatcher M. Brown, Harold Kountze, James B. Mabon and John C. Trap-

hagen, being the General Bondholders' Protective Committee, Cause No. 1583, were heard and on April 13, 1938 an opinion was handed down by the Circuit Court of Appeals for the Tenth Circuit affirming the order of this Court from which the appeals in question were taken.

On June 15, 1938, mandate having been sent down from the Circuit Court of Appeals for the Tenth Circuit to the Clerk of this Court, The Colorado Fuel and Iron Corporation paid unto General Bondholders' Protective Committee the sum of \$2,105.59, that is, \$500.00 for fees and \$1,605.59 for reimbursement of expenses; and on said date paid unto Sullivan & Cromwell the sum of \$2,629.70, that is \$2,500.00 for fees and \$129.70 reimbursement of expenses as allowed by the aforesaid order of Court entered herein June 25, 1937. These payments complete the payments allowed by said order.

Trustee further states that the deed from The Colorado Fuel and Iron Company, The Colorado Industrial Company, Arthur Roeder, as Trustee, and The New York Trust Company, as Trustee, to The Colorado Fuel and Iron Corporation, dated as of July 1, 1936, mentioned in the Second Interim Report of the Trustee, as above mentioned, was a blanket instrument transferring and conveying all properties and assets of The Colorado Fuel and Iron Company and of The Colorado Industrial Company and of Arthur Roeder as Trustee thereof, and all right, title and interest of The New York Trust Company, as Trustee under The Colorado Industrial Company Mortgage, and supplements thereto, unto The Colorado Fuel and Iron Corporation, but without specific description of the properties thereby conveyed or transferred. That thereafter this deed, which is entitled "Indenture and Bill of Sale", was supplemented by a formal release of the mortgage of The Colorado Industrial Company dated August 1, 1904, and all supplements thereto, executed by The New York Trust Company, as Trustee, under date of January 11, 1937. This release was duly delivered to The Colorado Fuel and Iron Corporation and was filed for record in each of the counties in each State in which the original mortgage or supplements thereto had been recorded. And, in addition thereto, The Colorado Fuel and Iron Company and The Colorado Industrial Company executed deeds in which Arthur Roeder, as Trustee, joined as a grantor, specifically conveying in each county in

each State in which said two companies were the record owner of property, the properties belonging to said companies and the Trustee in each of said counties and States. That these deeds, were in due course filed for record. In addition to these deeds, appropriate assignments, bills of sale, etc., were executed and delivered. Thus all of the properties and assets of The Colorado Fuel and Iron Company and of The Colorado Industrial Company and of Arthur Roeder, as Trustee thereof, were transferred, conveyed or assigned unto The Colorado Fuel and Iron Corporation.

The Trustee further reports that the Income Mortgage of The Colorado Fuel and Iron Corporation to The Chase National Bank of the City of New York and Carl E. Buckley, Trustees, which has heretofore been approved by this Court, has been filed for record in each county and State in which the property described in said mortgage is situated.

The Trustee further reports with respect to the matters required of the new corporation by Article Two of the order of Court dated June 20, 1936 that The Colorado Fuel and Iron Corporation by an agreement dated, as of July 1, 1936, entered into with Central Hanover Bank and Trust Company, as Trustee, formally assumed, pursuant to the plan of reorganization, the due and punctual payment of principal and interest upon the bonds of The Colorado Fuel and Iron Company, generally known as The Colorado Fuel and Iron General Bonds, dated as of February 1, 1893, to the extent that such bonds are now outstanding and similarly assumed all covenants and conditions of the mortgage or deed of trust and supplements thereto given to secure said bonds. All interest accrued on said bonds has been paid.

Further, The Colorado Fuel and Iron Corporation, in accordance with the plan of reorganization, issued unto J. & W. Seligman and Co., Reorganization Managers, a temporary certificate for 552,651 shares of its stock without par value and 9 certificates for such stock in temporary form for the purpose of qualifying its directors. That thereafter these temporary certificates were cancelled and arrangements were made for the issuance of permanent certificates in the amount of 552,660 shares to be issued with Income Bonds in accordance with the plan of reorganization to the holders of Industrial Bonds. Similarly warrants, and scrip for warrants, rep-



representing the right to purchase, according to the terms provided in the plan of reorganization, 315,379 shares of stock of the new corporation, were provided for. The Chase National Bank of the City of New York was appointed Transfer Agent for the stock of the new corporation and Bankers Trust Company, of New York, was appointed Registrar of the stock of the new corporation. The Chase National Bank of the City of New York was appointed Registrar of the Income Bonds of the New Corporation.

In accordance with the plan of reorganization, the Reorganization managers appointed The Chase National Bank of the City of New York and The International Trust Company, of Denver, Colorado, as distributing agents to distribute the stock and the Income Bonds of the new company in exchange for the surrender of the bonds of The Colorado Industrial Company and to distribute the warrants (and scrip for warrants) in accordance with the plan of reorganization in exchange for the stock of the old company.

As of June 30, 1938, \$11,029,200 face value of Income Bonds and 551,460 shares of stock of the new corporation had been issued in exchange for Colorado Industrial Bonds, leaving \$24,000 of Income Bonds and 1200 shares of stock yet to be issued in exchange for Industrial Bonds. 465 shares of stock had been issued for cash at the rate of \$35.00 per share, by the exercise of warrants. The amount thus realized, was, by the Trustee under the Income Mortgage, used to retire \$18,000 face value of Income Bonds in accordance with the plan of reorganization and the Income Mortgage. As of June 30, 1938, only sixty Colorado Industrial Bonds remained outstanding not yet exchanged for the new stock and the new Income Bonds.

As of said date, that is, June 30, 1938, all of the outstanding preferred stock of the old company, except 1,714 shares, out of a total of 20,000 shares, and all of the outstanding common stock of the old company, except 20,572 shares, out of a total of 340,505 shares, had been exchanged by the holders thereof for warrants or scrip for warrants in accordance with the plan of reorganization.

Trustee states that some additional time may elapse before all of the Colorado Industrial Bonds and all of the stock, both

preferred and common, of the old company are surrendered pursuant to the plan of reorganization.

On July 6, 1937, an order was entered in this cause allowing The Chase National Bank of the City of New York and The International Trust Company, of Denver, Colorado, certain compensation for services rendered and expenses incurred in effecting the exchange of the stock of the new corporation and the Income Bonds of the new corporation for the bonds of The Colorado Industrial Company and the warrants of the new corporation for the stock of the old company. Pursuant to this order there has been paid in due course unto The International Trust Company, of Denver, Colorado, to May 10, 1938, a total of \$1,862.26, that is, for the handling of 6,040 pieces, fees of \$1,510.00, and for postage and other expenses \$352.26; and there has been paid to The Chase National Bank of the City of New York, to May 31, 1938, a total of \$15,017.03; that is, for handling 57,188 pieces, fees of \$14,297.00, and for postage and other expenses \$720.03.

The Trustee further respectfully reports pursuant to Article Three of the order of Court dated June 20, 1936 that the new corporation, The Colorado Fuel and Iron Corporation, has paid the following:

1. All claims of the United States of America and of the State of Colorado, with this exception, that the final income tax return of the Trustee for a period ending June 30, 1936 has not yet been reviewed by the Bureau of Internal Revenue and some adjustments may result on the final determination of the liability of the Trustee in that regard.

2. All workmen's compensation claims have been paid as accrued.

3. All obligations of Arthur Roeder as Receiver during the receivership proceedings have been paid and discharged.

4. All obligations of The Colorado Fuel and Iron Company to its subsidiaries have been paid, or otherwise liquidated.

5. All current liabilities of The Colorado Fuel and Iron Company incurred in the ordinary conduct of its business prior to the appointment of the Receiver August 1, 1933 have been paid and discharged.

6. All claims adjusted or liquidated and allowed by the Court arising from the disaffirmance of contracts by the Receiver or the Trustee have been paid or discharged.

7. All amounts allowed as compensation for services rendered or as reimbursement for expenditures incurred in connection with the receivership proceedings and reorganization proceedings have been paid with the exception of the amounts currently earned by The Chase National Bank of the City of New York and The International Trust Company, of Denver, Colorado, as distributing agents.

Trustee further reports that on September 23, 1936, he filed in these proceedings a report dated September 23, 1936, showing that notices, dated September 1, 1936, had been mailed to all known stockholders and holders of Colorado Industrial Bonds to the effect that the new securities to be issued pursuant to the plan of reorganization were ready for distribution. Reference is made to said report for further details.

Trustee respectfully shows that interest at the rate of 5% per annum for the calendar year 1936, representing the first coupon, on the entire authorized amount of the Income Bonds of the new corporation was by the Board of Directors of the new corporation at a meeting held on March 11, 1937, declared due and payable on April 1, 1937. And thereafter said interest was paid to the trustee, as paying agent, in due course for distribution to the bondholders. Similarly, the interest for the full amount of 5% for the year 1937 on the entire authorized amount of said Income Bonds was by the Board of Directors at a meeting held January 28, 1938, declared due and payable April 1, 1938 and the amount thereof was thereafter in due course paid to the trustee, as paying agent, for distribution to the bondholders. That prior to the declaration of the corporation that said interest was due and payable for the years 1936 and 1937, all terms and conditions of the plan of reorganization and the income mortgage with respect to the available net income, as defined in Section 8, Article 2, and the consolidated net current assets, as defined in Section 9, of Article 2 of the Income Mortgage, were met and fulfilled and reports to that effect were submitted to the Board of Directors of The Colorado Fuel and Iron Corporation by Peat, Marwick, Mitchell & Company, certified public accountants. Copies of the reports of said accountants dated

February 26, 1937 and February 15, 1938 are attached hereto and made a part hereof as Exhibits "A" and "B", respectively. Sections 8 and 9, Article Two of the Income Mortgage were copied from and form a part of Exhibit "C" of the plan of reorganization.

Trustee further reports that on March 11, 1937, after providing for the payment of interest on the Income Bonds on April 1, 1937, the Board of Directors of The Colorado Fuel and Iron Corporation declared a dividend of \$1.00 per share, payable March 31, 1937. That this is the only dividend which has been paid on the stock of the new corporation.

The Trustee further respectfully shows unto the Court that the matters herein reported by him which are more peculiar to the duties and obligations of The Colorado Fuel and Iron Corporation, are within the knowledge of your Trustee inasmuch as he is now the president of that corporation. This report, although entitled Final Report of Trustee, incorporates for the information of the Court and all parties interested, matters and things which were, by the plan of reorganization and orders of Court relating thereto, the obligations or duties of the new corporation.

This report does not purport to include the details of many of the transactions undertaken in the consummation of the plan of reorganization, or of certain corporate activities which have no immediate bearing upon the administration of the estates of the Debtors by the Trustee. Inasmuch, however, as it does summarize the administration of the Trustee, and, in connection with previous reports, gives a full accounting of his financial transactions, it is respectfully submitted to the Court as the Trustee's final report.

Trustee, therefore, prays that he be discharged as Trustee of the estates of said Debtor Companies and that the surety upon his bonds be discharged from further liability.

Dated at Denver, Colorado, September 12th, 1938.

ARTHUR ROEDER,

Trustee of the Estates of The  
Colorado Fuel and Iron Com-  
pany, and The Colorado In-  
dustrial Company.

FRED FARRAR,  
Attorney for Trustee.



[Verification omitted.]

Filed Sep. 13, 1938, 11:10 A. M. George A. H. Fraser, Clerk.

Exhibit N.

In the District Court of the United States  
for the District of Colorado.

In the Matter

of

The Colorado Fuel and Iron Com-  
pany, and Another, Colorado cor-  
porations;

Debtors.

In Proceedings  
For Reorganization

Consolidated Cause  
No. 8081.

Final Decree.

This Cause came on to be further heard on the 12th day of October, 1938, upon the final report of Arthur Roeder, as Trustee of the Estates of The Colorado Fuel and Iron Company and The Colorado Industrial Company, and upon consideration thereof, It Is Ordered, Adjudged, and Decreed as follows:

That all debts and liabilities of The Colorado Fuel and Iron Company and of The Colorado Industrial Company, Debtors, and all rights and interests of the stockholders of said Debtors, and each of them, be and the same are discharged, except as provided in the Plan of Reorganization of said Debtors, and in the orders of Court relating thereto, more particularly the order entered herein on April 25, 1936 confirming said Plan of Reorganization, and the order entered herein on June 30, 1936 approving the form of documents and directing the transfer of assets to and the issue of securities and assumptions of liabilities by The Colorado Fuel and Iron Corporation, the new corporation provided for and organized pursuant to said Plan of Reorganization. All creditors and stockholders of said Debtors and each of them are hereby enjoined from enforcing or attempting to enforce in any manner or form whatsoever any rights, claims or demands against said Debtors, or against The Colorado Fuel and Iron Corpora-

tion, or the officers, agents, or stockholders thereof, or against the assets of The Colorado Fuel and Iron Corporation, save and except in the manner and to the extent provided for in said Plan of Reorganization and the orders of Court above mentioned.

It Is Further Ordered, Adjudged and Decreed That Arthur Roeder, as Trustee for the Estates of The Colorado Fuel and Iron Company and The Colorado Industrial Company, be and he hereby is finally discharged as such Trustee and from any further duties, liabilities or obligations as such Trustee, and the surety upon his bonds is hereby discharged from further liability.

It Is Further Ordered, Adjudged and Decreed That these proceedings be terminated and the Estates of the Debtors herein be closed, Reserving Unto This Court However jurisdiction to require compliance by The Colorado Fuel and Iron Corporation, the new corporation, the Reorganization Managers, and all others, of the performance and fulfillment of their respective duties, obligations and assumptions as provided in the Plan of Reorganization and the orders of Court relating thereto.

Dated at Denver, Colorado, as of October 12, 1938.

J. FOSTER SYMES, Judge:

Filed Nov. 18, 1938, 2:30 P. M. George A. H. Fraser, Clerk.

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Designation of Additional Portions of Record to Be  
Contained in Record on Review.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in addition to those already designated by the Appellant, the Commissioner of Internal Revenue, in connection with the petition for review by the said Circuit Court of Appeals for the Tenth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Stipulation of Facts, together with the exhibits attached thereto.

2. This designation of additional portions of record to be contained in record on review.

(s) STEPHEN H. HART,  
Counsel for the Respondent  
on Review.

No objection,

(s) J. P. WENCHEL,  
Attorney for Petitioner.  
(Filed Jan. 21, 1941.)

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Affidavit of Mailing.

State of Colorado, City and County of Denver, ss.

Stephen H. Hart, of lawful age, being on oath first duly sworn, deposes and says that he is one of the attorneys for the Respondent on Review, the Petitioner before the United States Board of Tax Appeals, and that he served a copy of foregoing Designation of Additional Portions of Record to be Contained in Record on Review, upon J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, by mailing copies to him on January 17, 1941, registered mail, postage prepaid, addressed to the Bureau of Internal Revenue, Washington, D. C.

(s) STEPHEN H. HART.

Subscribed and sworn to before me this 17th day of January, 1941.

My commission expires January 15, 1942.

(s) LOUISE HATFIELD,  
Notary Public.

(Seal)

Filed Jan. 21, 1941.

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**Order Enlarging Time.**

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation and delivery of the record ~~sur~~ petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Tenth Circuit, be and it is hereby extended to Feb. 24, 1941.

(signed) CHARLES P. SMITH,  
Member.

Dated: Washington, D. C.,

Dec. 21, 1940.

jd

Now, Feb. 14, 1941, the foregoing order certified from the record as a true copy.

B. D. GAMBLE,  
Clerk, U. S. Board of Tax  
Appeals.

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**Certificate.**

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 193, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeipie in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 14th day of February, 1941.

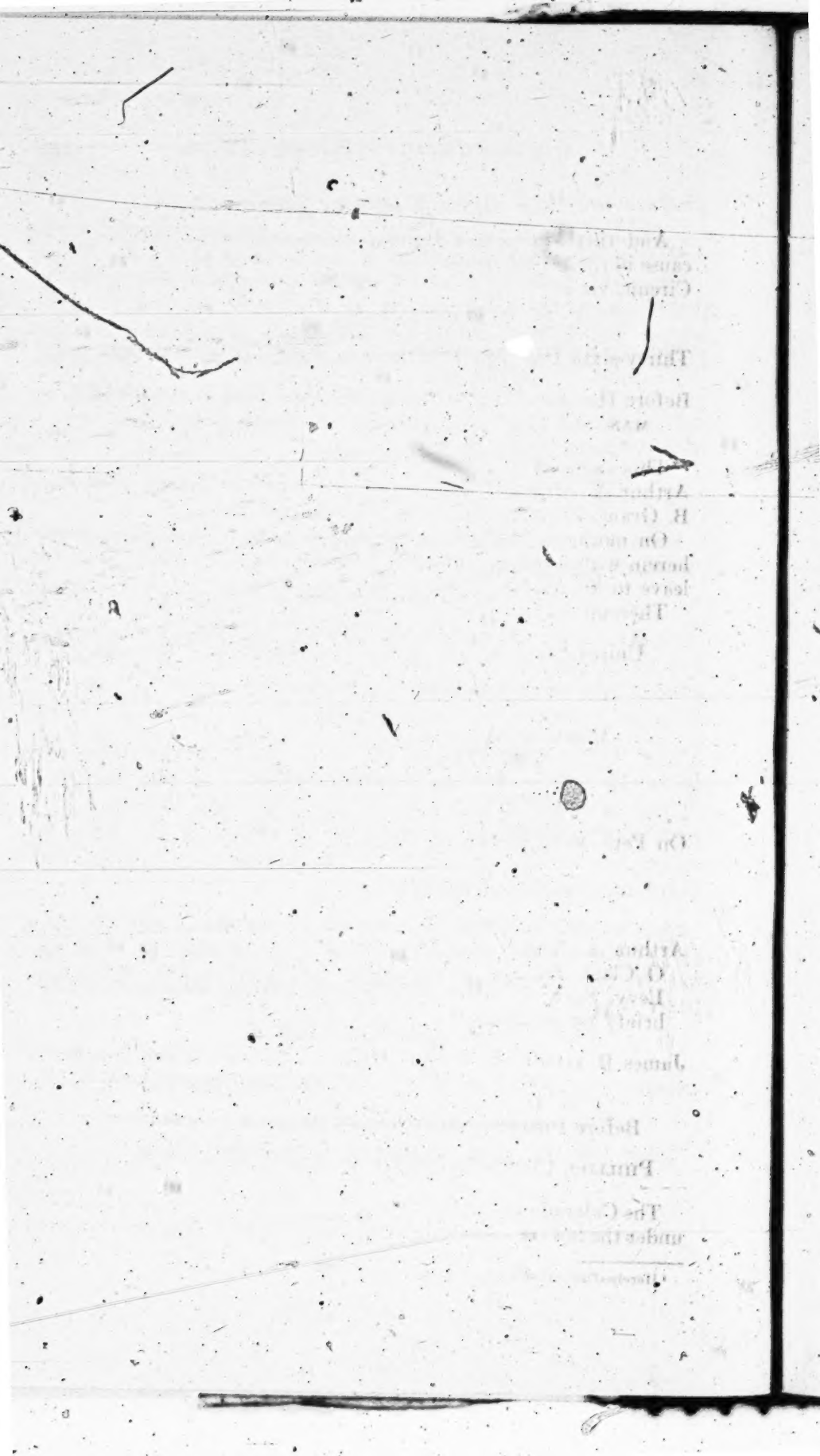
B. D. GAMBLE,  
Clerk, United States Board  
of Tax Appeals.

(Seal)

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Filed Feb. 17, 1941. Robert B. Cartwright, Clerk.





And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz.:

**Order of submission**

Thirty-sixth Day, April Term, Wednesday, June 25th, A. D. 1941

Before Honorable ORIE L. PHILLIPS, Honorable WALTER A. HUXMAN, and Honorable ALFRED P. MURRAH, Circuit Judges

This cause came on to be heard and was argued by counsel, Arthur A. Armstrong, Esquire, appearing for petitioner, James B. Grant, Esquire, appearing for respondent.

On motions, petitioner was granted leave to file a reply brief herein within ten days from this day and respondent was granted leave to file an answer thereto within ten days thereafter.

Thereupon this cause was submitted to the court.

United States Circuit Court of Appeals, Tenth Circuit

No. 2270. APRIL TERM, 1941

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CEMENT INVESTORS, INC., RESPONDENT

On Petition to Review the Decision of the United States Board of Tax Appeals

July 24, 1941

Arthur A. Armstrong, Spec. Asst. to the Atty. Gen. (Samuel O. Clark, Jr., Asst. Atty. Gen., and Sewall Key and Samuel H. Levy, Spec. Assts. to the Atty. Gen., were with him on the brief) for petitioner

James B. Grant (Lewis and Grant, and Stephen H. Hart were with him on the brief) for respondent

Before PHILLIPS, HUXMAN, and MURRAH, Circuit Judges

PHILLIPS, Circuit Judge, delivered the opinion of the court

The Colorado Industrial Company<sup>1</sup> was a corporation organized under the laws of Colorado. On August 1, 1904, Industrial issued

<sup>1</sup> Hereinafter called Industrial.

its five percent first mortgage bonds<sup>2</sup> due August 1, 1934, and secured by a deed of trust on its property. The total face value of Industrial's bonds held by the public on August 1, 1934, was \$27,633,000.

The Colorado Fuel and Iron Company<sup>3</sup> was a corporation organized under the laws of Colorado. It was engaged in the manufacture and sale of iron and steel products. It owned all the capital stock of Industrial consisting of 200 shares, and had unconditionally guaranteed both the principal and interest of Industrial's bonds. On August 1, 1933, Industrial was not engaged in any active business and had no assets of any substantial value, having transferred substantially all of its assets to the Colorado Company in 1913.

On August 1, 1933, Industrial and the Colorado Company defaulted in the payment of the annual interest due on Industrial's bonds.

On August 1, 1933, the stock and securities of the Colorado Company outstanding in the hands of the public were its general mortgage five percent bonds<sup>4</sup> of the face value of \$4,500,000, secured by a mortgage on its property, 20,000 shares of eight percent cumulative preferred stock, each of the par value of \$100, and 340,505 shares of common stock, of no par value. Dividends were not paid on the preferred stock after November 25, 1931. On August 1, 1933, the Colorado Company defaulted in the payment of the semiannual interest due on the general bonds. On that date, a receiver for the property of the Colorado Company was appointed by the District Courts of the United States for the Districts of Colorado and Wyoming.

On August 1, 1934, Industrial and the Colorado Company, both being in default in the payment of the principal and interest due on Industrial's bonds, filed petitions for reorganization in the District Court of the United States for the District of Colorado under § 77B of the Bankruptcy Act. The petitions were approved and Arthur Roeder was appointed trustee.

On August 1, 1936, Cement Investors, Inc.,<sup>5</sup> a corporation organized under the laws of Delaware, owned Industrial's bonds of the face value of \$44,000.

On March 12, 1935, a plan of reorganization was filed in the bankruptcy proceedings. It provided for the organization of the Colorado Fuel and Iron Corporation,<sup>6</sup> authorized to issue 1,000,000 shares of stock without par value and five percent income mort-

<sup>2</sup> Hereinafter called Industrial's bonds.

<sup>3</sup> Hereinafter called the Colorado Company.

<sup>4</sup> Hereinafter called general bonds.

<sup>5</sup> Hereinafter called the taxpayer.

<sup>6</sup> Hereinafter called the Colorado Corporation.

gage bonds<sup>1</sup> of the face value of \$11,053,200. It further provided that the Colorado Corporation should assume the payment of the general bonds which were not disturbed in the reorganization;<sup>2</sup> that all of the income bonds and 552,660 shares of the capital stock of the Colorado Corporation should be issued in exchange for the defaulted Industrial's bonds in the ratio of \$400 face value of income bonds and 20 shares of stock for each \$1,000 face value of Industrial's bonds. The plan declared that it gave the entire ownership and control of the Colorado Corporation to the Industrial bondholders. It recognized no present equity in the stockholders. However, it made provision for them to regain an equity by providing that warrants should be issued to the holders of preferred and common stock of the Colorado Company entitling them to purchase, on or before February 1, 1950, common stock in the Colorado Corporation at \$35 per share in the following ratios: For each share of Colorado Company preferred three shares of Colorado Corporation and for each share of Colorado Company common three-fourths of one share of Colorado Corporation. The subscription price was considerably higher than the open market price for the shares of the Colorado Corporation at the date of the consummation of the plan. The plan was duly accepted by the bondholders and shareholders of Industrial and the Colorado Company. On April 25, 1936, the court entered its order confirming the plan of reorganization. In the order the court found that Industrial and the Colorado Company had been in default on Industrial's bonds since August 1, 1934, and since that date had been unable to meet their debts as they matured, and that the plan was fair and equitable and did not discriminate unfairly in favor of any class of creditors or stockholders.

The Colorado Corporation was organized pursuant to the plan and on June 20, 1936, the court entered its order directing that on July 1, 1936, the Colorado Company, Industrial, the reorganization trustee of both, and the New York Trust Company, as trustee under Industrial's mortgage, should convey all their right, title, and interest in all of the assets of the Colorado Company and Industrial to the Colorado Corporation, and that the income bonds and 552,660 shares of the Colorado Corporation should be distributed to the holders of Industrial's bonds in exchange therefor. All of such assets were transferred to the Colorado Corporation and its bonds and stock were issued to the holders of Industrial's bonds in exchange therefor. The taxpayer surrendered Industrial's bonds of the face value of \$44,000 in exchange for

<sup>1</sup> Hereinafter called income bonds.

<sup>2</sup> Under order of the court the past-due interest and current interest on the general bonds had been paid by the trustee.



\$17,600 face value income bonds and 880 shares of the Colorado Corporation.

The 552,660 shares of the Colorado Corporation were issued to holders of Industrial's bonds in exchange therefor. No stock was issued to parties other than holders of Industrial's bonds until October 23, 1936, and by June 30, 1938, only 465 shares had been issued to holders of warrants.

The capital stock of Industrial was cancelled and the mortgage securing the Industrial bonds was satisfied and discharged.

The warrants provided that the holders thereof should have no voting rights or other rights whatsoever as stockholders of the Colorado Corporation.

The fair market value of new securities received by the taxpayer was \$37,884, exceeding the cost basis of its Industrial's bonds by \$22,990.75.

The Commissioner determined deficiencies aggregating \$16,985.03. The taxpayer admitted liability for \$2,559.02. On petition for redetermination, the Board found a deficiency in the latter amount and entered its order accordingly.

This is a petition to review the order of the Board.

The pertinent statutes are set out in the margin.\*

The elements which constitute a nontaxable exchange under § 112 (b) (5) are that

- (a) Property
- (b) Be transferred to a corporation
- (c) Solely in exchange for stock or securities in such corporation, and that.
- (d) The transferors immediately after the exchange be in control of the corporation, through ownership of 80 percent of all voting stock and at least 80 percent of all other classes of stock of the corporation.

\* Section 112 of the Revenue Act of 1936, 49 Stat. 1678, in part reads as follows:  
 "(b) (3) Stock for Stock on Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

"(b) (5) Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange."

"(c) Definition of Reorganization.—As used in this section and section 113—

"(1) The term 'reorganization' means . . . (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred."

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another."

"(b) Definition of Control.—As used in this section the term 'control' means the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation."

Under § 112 (b) (5), a reorganization is not an essential element.<sup>10</sup>

Both Industrial and the Colorado Company, as guarantor, had defaulted in the payment of the interest and principal of Industrial's bonds. The defaults had not been cured, and neither Industrial nor the Colorado Company was able to cure them. There was no equity in the properties over and above the bonded debts secured by Industrial's mortgage and the Colorado Company's mortgage. The holders of Industrial's bonds were entitled to a satisfaction of their indebtedness from the mortgaged property, or a statutory substitute therefor under § 77B. They had acquired equitable rights in the property and were entitled to have it disposed of under a plan, fair and equitable to them. On the approval of the petitions under § 77B, the property of Industrial and the Colorado Company came under the jurisdiction of the bankruptcy court and private rights in respect to the res became subject to the superior dominion of the court and were to be adjudicated pursuant to the standards prescribed in § 77B.<sup>11</sup> Since no equity remained in the properties for the preferred and common stockholders, the properties passed under the jurisdiction of the court empowered to make fair and equitable disposition thereof for the benefit of the bondholders. In the exercise of that jurisdiction the bankruptcy court ordered the equitable rights and interests of the bondholders in the properties to be transferred to the Colorado Corporation in exchange for stock and bonds of that corporation. Pursuant to the order, all of the assets of Industrial and the Colorado Company were transferred to the Colorado Corporation. In substance, Industrial's bondholders were the transferors.

Furthermore, the bonds of Industrial were property in the hands of the holders thereof<sup>12</sup> and they were transferred to the Colorado Corporation in exchange for all of the voting stock thereof, and under the plan no additional stock was to be presently issued. The warrants gave no rights to the holders thereof to vote or otherwise exercise the rights of stockholders.

Hence, property was transferred to the Colorado Corporation solely in exchange for stock and securities of such corporation and immediately after the transfer the bondholders, the transferors, were in control of the Colorado Corporation, owning all of its

<sup>10</sup> *Portland Oil Company v. Commissioner*, 1 Cir., 109 F. 2d 479, 489; *Hartford-Empire Company v. Commissioner*, 43 B. T. A. No. 20; *Leckie v. Commissioner*, 37 B. T. A. 252, 257; *Handbird Holding Corporation v. Commissioner*, 32 B. T. A. 238, 247.

<sup>11</sup> *Case v. Los Angeles Lumber Company*, 308 U. S. 106, 125.

<sup>12</sup> *Leckie v. Commissioner*, 37 B. T. A. 252, 257; *Rockford Brick & Tile Co. v. Commissioner*, 31 B. T. A. 537; *Miller and Paine v. Commissioner*, 42 B. T. A. No. 89; *Portland Oil Company v. Commissioner*, 1 Cir., 109 F. 2d 479, 488; *P. A. Birren & Son v. Commissioner*, 7 Cir., 116 F. 2d 718, 719. See also, *Commissioner v. New Haven & S. L. R. R. Co.*, 2 Cir., — F. 2d — (decided July 16, 1941); *Id.*, — B. T. A. —, Prentice-Hall, 1941, Vol. 4, Par. 64,318.

stock, and no gain or loss should be recognized by reason of the provisions of § 112 (b) (5).

Moreover, we think, as the Board held, there was a reorganization within the meaning of § 112 (g) (1) and, hence, under § 112 (b) (3) no gain or loss should be recognized.

The elements required by § 112 (g) (1) (C) are: (1) that there be a transfer by a corporation of all or a part of its assets to another corporation, and (2) that immediately after the transfer the transferor or its stockholders, or both, be in control of the corporation to which the assets were transferred.

The assets of both Industrial and the Colorado Company were transferred to the Colorado Corporation. Immediately after the transfer, the bondholders of Industrial were in control of Colorado Corporation, since all the capital stock of the latter to be presently issued was delivered to them in exchange for Industrial's bonds. The court order of June 20, 1936, directed the transfer of the assets and the issuance of the securities of the Colorado Corporation, and stated that the provisions thereof should constitute "a single and entire order and direction."

Substantially all the assets of Industrial which were subject to the lien of the mortgage securing Industrial's bonds had been transferred to the Colorado Corporation and the latter had unconditionally guaranteed the principal and interest of the bonds. Industrial and the Colorado Company had been in default as to the interest on the bonds since 1933 and as to the principal thereof since 1934, and were unable to cure the defaults. No equity remained in the property for the preferred or common stockholders. Industrial bondholders were entitled to have the property subjected to the payment of their bonds or to an equitable substitute therefor under the provisions of § 77B. The bondholders had an equitable right in the property and the stockholders had lost their equity therein. From a realistic point of view, the bondholders had supplanted the stockholders and were equitably entitled to have the property of Industrial and the Colorado Company disposed of for their benefit. We think, therefore, that the bondholders may be regarded as stockholders of Industrial and the Colorado Company. Such was the holding in *Commissioner v. Kitselman*, 7 Cir., 89 F. 2d 458, c. d. 302 U. S. 709.<sup>13</sup>

<sup>13</sup> The rationale of the *Kitselman* Case has been followed in the following decisions: *Commissioner v. Newberry L. & C. Co.*, 6 Cir., 94 F. 2d 447, 449; *Commissioner v. Southwest Consolidated Corporation*, 5 Cir., 119 F. 2d 561, 563; *Commissioner v. Alabama Asphaltic Limestone Co.*, 5 Cir., — F. 2d — (decided May 5, 1941);

*Rex Mfg. Co. v. Commissioner*, 7 Cir., 102 F. 2d 325, 329;

*Leckie v. Commissioner*, 37 B. T. A. 252, 256;

*Greenwood v. Commissioner*, 41 B. T. A. 664, 668;

*Howard Hotel Corporation v. Commissioner*, 39 B. T. A. 1147, 1153;

*Commissioner v. New Haven & S. L. R. R. Co.*, 2 Cir., — F. 2d — (decided July 16, 1941).

*LeTulle v. Scofield*, 308 U. S. 415, and *Helvering v. Tyng*, 308 U. S. 527, are clearly distinguishable. In the former, *LeTulle* was the sole stockholder in the Gulf Coast Irrigation Company. All of its properties were transferred to the Gulf Coast Water

Furthermore, for the reasons heretofore indicated, the Industrial bondholders, in reality, were the transferors of the properties transferred to the Colorado Corporation.

In either event, regarding them either as stockholders or transferors, immediately after the transfer they were in control of the Colorado Corporation, to which the assets had been transferred, owning all of the presently issued stock of the Colorado Corporation and entitled to exercise all of the voting rights of the stockholders of the Colorado Corporation.

We accordingly conclude the decision of the Board of Tax Appeals was right and it is *Affirmed*.

No. 2270—Commissioner v. Cement Investors, Inc.

HUXMAN, Circuit Judge, Concurring Specially.

It is my conclusion that the transaction falls within Sec. 112 (b) (5) and is therefore exempt. The bondholders did transfer property to the new corporation in exchange for its securities and they were in charge of the new corporation immediately after the exchange. Sec. 112 (b) (5) therefore exempts them from the duty of reporting the transaction for income tax purposes at this time.

I cannot agree with the conclusion of the majority that the transaction is covered by Sec. 112 (g) (1), Sec. 112 (b) (3), and Sec. 112 (g) (1) (C). In my view, neither the insolvency of the corporation, the depreciation of its assets to the point where they are insufficient to pay its obligations, nor even the fact that there is nothing left for the stockholders, results in a metamorphosis which changes a bondholder into a stockholder. Neither can I agree with the reasoning in *Commissioner v. Kitselman*. If it ever was the law, in my opinion it was overruled by the rationale of *LeTulle v. Scofield*, 308 U. S. 415.

### *Judgment*

Forty-eighth Day, April Term, Thursday, July 24th, A. D. 1941

Before Honorable ORIE L. PHILLIPS, Circuit Judge, and Honorable J. FOSTER SYMES, District Judge

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

Company. LeTulle received cash and bonds, but no stock in the Water Company. Hence, he became a mere creditor of the Water Company and retained no stake in the enterprise. See *Commissioner v. Southwest Consolidated Corporation*, 5 Cir., 119 F. 2d 561, 563, and *Commissioner v. New Haven & S. L. R. R. Co.*, supra.

In the Tyng Case, the owners of stock in one corporation transferred their stock to another corporation in exchange for cash and gold debenture and gold debenture bonds. Here again, stockholders of the old corporation became creditors of the new corporation and retained no stake in the enterprise. For the facts in the Tyng Case, see *Commissioner v. Tyng*, 2 Cir., 108 F. 2d 55.



On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said United States Board of Tax Appeals be and the same is hereby affirmed.

An August 30, 1941, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States Board of Tax Appeals.

*Clerk's Certificate*

*United States Circuit Court of Appeals, Tenth Circuit:*

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the transcript of the record from the United States Board of Tax Appeals, and full, true and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2270, wherein Commissioner of Internal Revenue was petitioner and Cement Investors, Inc., was respondent, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 9th day of September, A. D. 1941.

[SEAL]

ROBERT B. CARTWRIGHT,

*Clerk of the United States Circuit Court  
of Appeals, Tenth Circuit.*

By: GEORGE A. PEASE,  
*Deputy Clerk.*

## Supreme Court of the United States

No. 644—, October Term, 1941

*Order allowing certiorari*

March 9, 1942

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 645

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

vs.

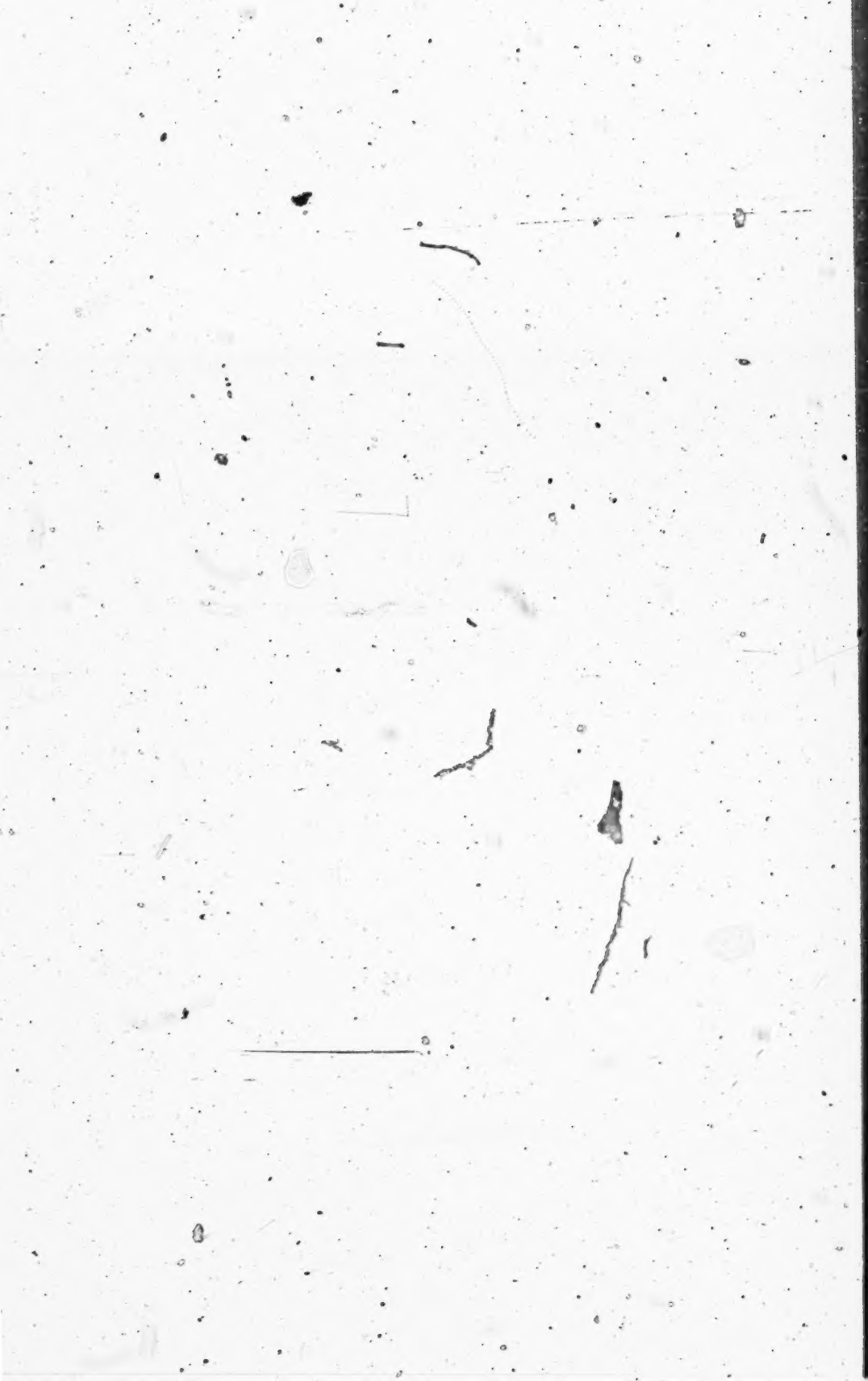
JAMES Q. NEWTON TRUST

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT

---

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1941  
CERTIORARI GRANTED MARCH 9, 1942





# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 645

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

VS.

JAMES Q. NEWTON TRUST

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT

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A [Caption omitted.]

1 In United States Circuit Court of Appeals for the Tenth  
Circuit

No. 2268

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JAMES Q. NEWTON TRUST, RESPONDENT

*Petitioner's designation of record*

Filed February 19, 1941

ROBERT B. CARTWRIGHT, Clerk,

*U. S. Circuit Court of Appeals for the Tenth Circuit,  
Denver, Colo.*

SIR: Further reference is made to your letters of February 11, 1931, acknowledging receipt of transcript of record in the above entitled proceedings upon petitions for review by the Commissioner of Internal Revenue, and to our telegram of February 17, 1941, designating the portion of the records in the two cases for printing. We now confirm as our designation of the record to be printed in Commissioner v. James Q. Newton Trust, No. 2268, that the entire transcript of record as filed be printed, including the stipulation of facts and the exhibits to stipulation "A" to "N," inclusive.

Respectfully,  
For the Attorney General,

SAMUEL O. CLARK, Jr.,  
Samuel O. Clark, Jr.,  
*Assistant Attorney General.*

[File endorsement omitted.]

2 Before United States Board of Tax Appeals

JAMES Q. NEWTON TRUST, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 97324

Appearances—For Petitioner: Richard M. Davis, Esq., Quigg Newton, Jr., Esq., For Respondent: A. R. Shannon, Jr., Esq., Carroll Walker, Esq.

*Docket entries*

1939

- Mar. 2—Petition received and filed. Taxpayer notified. (Fee paid.)
- Mar. 2—Copy of petition served on General Counsel.
- Apr. 18—Answer filed by General Counsel.
- Apr. 18—Request for Circuit hearing in Denver, Colorado, filed by General Counsel.
- Apr. 24—Notice issued placing proceeding on Denver, Colorado, Calendar. Answer and request served.
- July 28—Hearing set Sept. 18, 1939, in Denver, Colorado.
- Sept. 21—Hearing had before Miss Harron on merits. Stipulation of facts filed. Consolidated for hearing with docket 97325. Petitioner's brief due 11/6/39—respondent's brief due 12/6/39—reply due 12/21/39.
- Oct. 9—Transcript of hearing Sept. 21, 1939 filed.
- Nov. 6—Brief filed by taxpayer. 11/6/39 copy served.
- Nov. 27—Motion for extension to Jan. 6, 1940, to file brief filed by General Counsel. 11/28/39 granted and petitioner's reply due Feb. 6, 1940.

1940

- Jan. 5—Motion for extension to 1/22/40 to file brief filed by General Counsel. 1/6/40 granted—Petitioner's reply due Feb. 21, 1940.
- Jan. 24—Motion for leave to file attached brief filed by General Counsel. 1/25/40 granted.
- 3 Feb. 5—Motion for extension to March 25, 1940, to file reply brief filed by taxpayer.
- Mar. 11—Motion for leave to file the attached reply brief filed by taxpayer. Reply brief lodged. 3/11/40 granted.
- Mar. 12—Copy of motion and reply brief served on General Counsel.
- Aug. 6—Findings of fact and opinion rendered—Miss Harron, Division 13. Decision will be entered under Rule 50.
- Sept. 4—Agreed computation of deficiency filed.
- Sept. 6—Decision entered—Miss Harron, Division 13.
- Nov. 26—Petition for review by U. S. Circuit Court of Appeals, Tenth Circuit, with assignments of error filed by General Counsel.
- Dec. 2—Proof of service filed (counsel).
- Dec. 5—Proof of service filed by General Counsel (taxpayer).
- Dec. 21—Motion for extension to 2/24/41 to complete and transmit record filed by General Counsel.
- Dec. 21—Order enlarging time to 2/24/41 to prepare and transmit the record entered.

1941

- Jan. 8—Statement of points filed by General Counsel with affidavit of service thereon.



1941

- Jan. 8—Designation of portions of record to be contained in review record filed by General Counsel with affidavit of service thereon.
- Jan. 18—Proof of service of filing statement of points filed by General Counsel.
- Jan. 18—Proof of service of filing designation of record filed by General Counsel.

Before United States Board of Tax Appeals

*Petition*

Filed March 2, 1939

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in notice of deficiency, IT: CL: P-7 (FLD-90D), dated December 3, 1938, and for a finding and determination by the Board of an overpayment by Petitioner of its income tax for the calendar year 1936, in the amount of \$29,994.07, so that when the decision of the Board has become final, such overpayment, together with interest or such other sum as may be recoverable by law, shall be credited or refunded to Petitioner:

As a basis of its proceeding Petitioner alleges, as follows:

1. That Petitioner now is, and at all times herein mentioned has been, a fiduciary trust with its principal office at 828 17th Street, Denver, Colorado. The income tax returns for the period here involved were filed with the Collector of Internal Revenue for the District of Colorado at Denver, Colorado.

2. The notice of deficiency (copy of which is attached hereto and marked "Exhibit A") was mailed to Petitioner on December 3, 1938.

3. The taxes in controversy consist of income taxes for the calendar year 1936. The Respondent, by said notice of deficiency, has determined a deficiency of \$12,425.60, which, together with the aforesaid overpayment of \$29,994.07, is the amount in controversy.

4. The determination of the deficiency is based upon the following errors:

A. The holding of Respondent that the market value of \$60,800.00 face value of 5% Income Mortgage Bonds and 3,040 shares of common stock of The Colorado Fuel & Iron Corporation, on September 1, 1936, was \$85.25 and \$32.25, respectively.

B. The holding of Respondent that the surrender by Petitioner of \$152,000.00 face value Colorado Industrial Company 5% Bonds in exchange for \$60,800.00 face value of 5% Income Mortgage Bonds and 3,040 shares of common stock of The Colorado Fuel & Iron Corporation constituted a taxable exchange.

5. The facts upon which the Petitioner relies as the basis of this proceeding are, as follows:

#### A. First Assignment of Error

The fair market value of \$60,800.00 face value of 5% Income Mortgage Bonds of The Colorado Fuel & Iron Corporation on September 1, 1936, did not exceed \$79.00 and the fair market value of 3,040 shares of common stock of The Colorado Fuel & Iron Corporation on September 1, 1936, did not exceed \$26.50.

#### B. Second Assignment of Error

On March 1, 1935, there was filed in the District Court of the United States, for the District of Colorado, In the Matter of The Colorado Fuel and Iron Company and Another, Debtors, Consolidated Cause No. 8081, a Plan of Reorganization. At that time the Colorado Fuel and Iron Company had outstanding its own General Mortgage 5% Bonds, preferred stock and common stock, and it was also the guarantor on the First Mortgage 5% Bonds of the Colorado Industrial Company, a subsidiary corporation.

On April 25, 1936, the Court approved the Plan of Reorganization, which provided that a new company should be organized with an authorized capital of 1,000,000 shares of stock and \$11,052,200.00 5% Income Mortgage Bonds. The new company was to assume the payment of the General Mortgage 5% Bonds of the Colorado Fuel and Iron Company, which were not disturbed; was to issue \$11,053,200.00 of its Income Mortgage Bonds and 552,660 shares of its stock, in exchange for the First Mortgage 5% Bonds of the Colorado Industrial Company, in the ratio of \$400.00 face value of new bonds and 20 shares of stock for each \$1,000.00 face amount of Colorado Industrial Company bonds, and was to issue to preferred and common stockholders of the Colorado Fuel and Iron Company warrants to purchase certain specified amounts of stock of the new company at \$35.00 per share on or before February 1, 1950; 315,379 shares of stock of the new company being reserved for this purpose.

In pursuance of the Plan of Reorganization, The Colorado Fuel and Iron Corporation was organized under the laws of the State of Colorado, and on June 20, 1936, the Court directed

the Colorado Fuel and Iron Company, the Colorado Industrial Company, Arthur Roeder, Trustee, and The New York Trust Company, as Trustee under the Colorado Industrial Company Mortgage securing its First Mortgage 5% Bonds to convey to The Colorado Fuel and Iron Corporation all of their right, title and interest in all of the assets of the Colorado Fuel and Iron Company and the Colorado Industrial Company. Simultaneously therewith, The Colorado Fuel and Iron Corporation was directed to deliver to, or on the order of, the Reorganization Managers \$11,053,200.00 of its Income Bonds, 552,660 shares of its stock and warrants representing the right to purchase 315,379 shares of its stock. This order further provides that upon the surrender of the outstanding bonds of Colorado Industrial Company to the Reorganization Managers, they should distribute to the holders thereof the Income Mortgage Bonds and capital stock of The Colorado Fuel and Iron Corporation to which they were entitled, respectively, under the Plan. And The New York Trust Company, Trustee, was directed to execute and deliver to The Colorado Fuel and Iron Corporation a satisfaction and discharge of the First Mortgage of the Colorado Industrial Company.

On July 1, 1936, the Plan of Reorganization was consummated in accordance with the foregoing order, and thereafter the Petitioner surrendered its \$152,000.00 face amount of Colorado Industrial Company First Mortgage 5% Bonds in exchange for \$60,800.00 face amount of the Income Mortgage Bonds and 3,040 shares of the stock of The Colorado Fuel and Iron Corporation.

At that time, no shares of stock of The Colorado Fuel and Iron Corporation, other than the above-mentioned 552,660 shares of stock to be issued to the holders of Colorado Industrial Company First Mortgage 5% Bonds, were issued, so that immediately after the exchange, the holders of said Colorado Industrial Company bonds were in control of The Colorado Fuel and Iron Corporation.

### C. Refund of Overpayment

On August 4, 1937, Petitioner paid to the Respondent an additional income tax for the calendar year 1936 amounting to \$29,994.07 on account of the surrender by Petitioner of \$152,000.00 face value of Colorado Industrial Company 5% Bonds in exchange for \$60,800.00 face value of 5% Income Mortgage Bonds and 3,040 shares of common stock of The Colorado Fuel and Iron Corporation.

Wherefore, Petitioner prays that the Board hear this proceeding and determine that there is no deficiency in Petitioner's income tax for the calendar year 1936; and find and determine that the Petitioner overpaid its income tax for the year 1936 in the amount of \$29,994.07, so that when the decision of the Board herein has become final, said overpayment of \$29,994.07, together with interest or such other sum as may be recoverable by law, shall be credited or refunded to Petitioner.

QUIGG NEWTON, Jr.,  
Quigg Newton, Jr.,  
RICHARD M. DAVIS,  
Richard M. Davis,

*Colorado National Bank Building, Denver, Colorado,  
Counsel for Petitioner.*

[Verification omitted.]

[For Exhibit "A" referred to herein see Exhibit "C" attached to stipulation of facts which appears on page 49.]

[File endorsement omitted.]

#### Before United States Board of Tax Appeals

*Answer*

Filed April 18, 1939

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition, except it is admitted that the taxes in controversy are income taxes for the calendar year 1936.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5. A, B, and C, inclusive, denies the matter set forth in subparagraphs A to C, inclusive, of paragraph 5 of the petition, except it is admitted that petitioner surrendered \$152,000.00 face amount of Colorado Industrial Company First Mortgage 5% Bonds in exchange for \$60,800.00 face amount of the Income Mortgage Bonds and 3,040 shares of the stock of the Colorado Fuel and Iron Corporation.



Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) J. P. WENCHEL,

J. P. Wenchel,

§ Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

R. P. HERTZEG,

Division Counsel,

A. R. SHANNON, Jr.,

Special Attorney,

Bureau of Internal Revenue.

[File endorsement omitted.]

Before United States Board of Tax Appeals

*Findings of fact and opinion*

Filed Aug. 6, 1940

Corporation A owned all the stock of B. In 1913 it had acquired substantially all the assets of B. B owed to holders of bonds \$27,633,000, principal amount of first mortgage bonds. A also was a debtor to the holders of the bonds, having guaranteed payment of both principal and interest. When the bonds matured in 1934 A and B defaulted on both principal and interest, and filed petitions for corporate reorganization under section 77B of the Bankruptcy Act. The District Court for Colorado approved a plan of reorganization. Pursuant to this plan all the assets of A and B were transferred to C, a new corporation. The holders of the above bonds received stock and bonds of C, in exchange for their bonds and immediately controlled C. Held, the reorganization under section 77B of the Bankruptcy Act constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in section 112 (g) (1) (C).

Richard M. Davis, Esq., and Quigg Newton, Jr., Esq., for the petitioners.

Angus R. Shannon, Jr., Esq., and Carroll Walker, Esq., for the respondent.

In Docket No. 97324, James Q. Newton trust, the Commissioner determined a deficiency in income tax for the year 1936 in the amount of \$12,325.60. Petitioner denies that there is a deficiency in tax and alleges that it has overpaid tax in the amount of

\$29,941.07. In Docket No. 97325, James Q. Newton, Jr., the Commissioner determined a deficiency in income tax for the year 1936 in the amount of \$690.84. Petitioner denies that there is a deficiency in tax and alleges that he has overpaid tax in the amount of \$296.59. Each petitioner concedes that some of the adjustments giving rise to the deficiency have been determined correctly.

The only question involved is whether the exchange of bonds of the Colorado Industrial Co. for stock and bonds of the Colorado Fuel & Iron Corporation, a newly organized corporation, pursuant to a plan of reorganization under section 77B of the Bankruptcy Act, constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936.

#### *Findings of fact*

The James Q. Newton trust is a fiduciary trust, with its principal office at Denver, Colorado. Prior to September 10, 1936, the James Q. Newton trust owned \$152,000 face amount of Colorado Industrial Co. first mortgage 5 percent bonds due August 1, 1934.

James Q. Newton, Jr., is an individual residing in Denver, Colorado. Prior to September 10, 1936, he held \$10,000 face amount of the same bonds of the Colorado Industrial Co.

The Colorado Industrial Co., hereinafter called Industrial, was a Colorado corporation. It was wholly owned by the Colorado Fuel & Iron Co., hereinafter called Fuel & Iron, a Colorado corporation, which owned all of its capital stock, consisting of 200 shares. Fuel & Iron had been engaged in the manufacture and sale of steel and iron products. Industrial was not engaged in any active business and had no assets of any substantial value, having transferred substantially all of its assets to Fuel & Iron in the year 1913.

Under date of August 1, 1904, Industrial issued bonds, generally known as first mortgage 5 percent bonds, which were secured by a mortgage or deed of trust of Industrial. The bonds matured August 1, 1934. These bonds of Industrial were unconditionally guaranteed both as to principal and interest by Fuel & Iron. These bonds were Industrial's only securities outstanding in the hands of the public. The total face amount of these bonds held by the public on August 1, 1934, was \$27,633,000; in addition, Fuel & Iron owned \$7,741,000 face amount. Industrial defaulted in the payment of interest on these bonds due on August 1, 1933, and on subsequent interest installments; and Fuel & Iron defaulted under its guarantee of interest payments.

Fuel & Iron had outstanding in the hands of the public in 1933 \$4,500,000 face amount of bonds known as general mortgage 5

percent bonds. On August 1, 1933, Fuel & Iron defaulted in the payment of the semiannual interest due on its bonds. On the same day a receiver for the properties of Fuel & Iron was appointed by the United States District Courts of Colorado and Wyoming. Following the receivership of Fuel & Iron, committees were constituted for the purpose of representing bondholders and stockholders of Fuel & Iron and for the bondholders of Industrial. There was outstanding stock of Fuel & Iron consisting of 20,000 shares of 8 percent cumulative preferred stock, \$100 par value per share, and 340,505 shares of common stock, no par value. The preferred stock was entitled to cumulative dividends at the rate of 8 percent per annum, but ranked equally with the common stock in the distribution of assets. Dividends had not been paid on the preferred stock since November 25, 1931.

On August 1, 1934, when Industrial and Fuel & Iron defaulted on Industrial's first mortgage 5 percent bonds, each company filed petitions with the United States District Court for Colorado instituting proceedings for reorganization under section 77B of the Federal Bankruptcy Act. The previously appointed receiver of Fuel & Iron was appointed trustee of the properties of both companies in the reorganization proceedings.

11. A plan of reorganization of Fuel & Iron and Industrial, dated March 1, 1935, was drafted by the reorganization managers at the request of the separate committees for the bondholders of the two companies, and this proposed plan pursuant to section 77B of the Bankruptcy Act, was filed with the District Court. On May 1, 1935, an order of the District Court was entered finding and decreeing that the plan complied with the provisions of subdivision (b) of section 77B of the Bankruptcy Act, and that it had been duly prepared in accordance with subdivision (d) of section 77B. Among other things the court directed the trustee to mail copy of the plan and forms of acceptance of the plan to holders of bonds and stocks of Fuel & Iron, and of bonds of Industrial; which was done. Acceptances of the plan were filed by the holders of Industrial bonds and of the preferred and common stock of Fuel & Iron as follows:

| Security                             | Amount outstanding | Plan approved by holders of— |
|--------------------------------------|--------------------|------------------------------|
| Industrial bonds.....                | \$27,533,000       | 75.7%                        |
| Fuel & Iron pfd. stock (shares)..... | 20,000             | 81.3%                        |
| Fuel & Iron com. stock (shares)..... | 340,505            | 53.2%                        |

On April 25, 1936, the District Court entered its order confirming the plan. By this order the court approved the certificate of incorporation of a new corporation, the Colorado Fuel & Iron Corporation, hereinafter referred to as the new company.

That certificate had been filed in the office of the Secretary of State of Colorado on April 16, 1936. The authorized capital of the new company was 1,000,000 shares of common stock without par value. On June 20, 1936, the District Court entered its order approving forms of documents and directing, among other things, the transfer of all of the assets of Fuel & Iron and Industrial to the new company, which was done by executing proper conveyances.

The purpose of the reorganization plan was as follows:

- (1) To strengthen the capital structure of the enterprise, through drastic reduction of fixed charges and the provision of a financing medium for future financial requirements.
- 12 (2) To give full recognition to the paramount rights of bondholders.
- (3) To enable the stockholders to regain an interest in the enterprise upon a basis which takes account of the present junior rank of the stockholders and of the relative rights and priorities of the two classes of stock.

The effect of the plan was to give to the holders of Industrial's bonds the entire ownership and control of the new company, subject to \$4,500,000 bonds of Fuel & Iron which were not to be disturbed in the reorganization. Since the Industrial bonds were in default on both principal and interest, the only stock of the new company to be issued was 552,660 shares which were to be issued to the holders of Industrial bonds in exchange.

Under the approved plan of reorganization and orders of the District Court the following was done:

(1) As of July 1, 1936, the assets of Fuel & Iron and of Industrial were transferred by proper conveyances to the new company.

(2) The new company issued 552,660 shares of its stock to be distributed to holders of bonds of Industrial, reserved 315,379 shares to be applied against warrants, and reserved the remaining 131,961 shares for corporate purposes. It issued \$11,053,200 principal amount of 5 percent income mortgage bonds due April 1, 1970, to be distributed to Industrial's bondholders. It assumed payment of \$4,500,000 general bonds of Fuel & Iron, which bonds were not affected by the reorganization plan. It issued warrants for the purchase, on or before April 1, 1950, of 315,379 shares of its stock at \$35 a share to be distributed to the preferred and common stockholders of Fuel & Iron. The warrant agreement entered into between the new company and the Chase National Bank of New York, warrant agent, under date of July 1, 1936, provided that the holders of warrants should not have the right to vote or to receive notice as stockholders, and should have no rights whatsoever as stockholders of the new



company. The option price under the warrants was considerably higher than the opening market price for shares of the new company.

(3) The reorganization managers gave notice to the holders of Industrial's bonds and Fuel & Iron's stock that the new securities would be available for distribution on September 1, 1936.

(4) At or about that date the holders of Industrial bonds surrendered their bonds for cancelation in exchange for income mortgage bonds and stock of the new company upon the basis of (a) \$400 principal amount of income bonds and (b) 20 shares of common stock for each \$1,000 principal amount of Industrial bonds. Immediately after the consummation of the plan all of the issued stock of the new company, 552,660 shares of common stock, belonged to the former holders of bonds of Industrial. No stock was issued to parties other than such bondholders until October 23, 1936, when 37 shares were issued upon the exercise of warrants, and by June 30, 1938, only 465 shares had been issued upon the exercise of warrants.

(5) At or about the same date warrants to purchase common stock of the new company were distributed to preferred and common stockholders of Fuel & Iron as follows: For each share of preferred stock of Fuel & Iron, one warrant to purchase, on or before February 1, 1950, three shares of common stock of the new company at \$35 per share. For each share of common stock of Fuel & Iron there was given one warrant to purchase three-fourths of one share of common stock of the new company at \$35 a share.

(6) The capital stock of Industrial was canceled. Also \$7,741,000 principal amount of Industrial's bonds owned by Fuel & Iron were canceled. The first mortgage of Industrial which had secured its bonds was satisfied and discharged. These bonds had been held in Fuel & Iron's treasury, but they had not been set up as an asset or liability on the books. The amount of Industrial's bonds that had been carried on Fuel & Iron's books as a liability was \$27,633,001.<sup>1</sup>

On September 10, 1936, petitioner, the James Q. Newton trust, surrendered its Industrial bonds in the face amount of \$152,000 and received in exchange \$60,800 face amount of in-

<sup>1</sup> The aggregate amount of Industrial's bonds in default on August 1, 1934, carried on Fuel & Iron's books was \$27,633,000. The Industrial bonds had been set upon on Fuel & Iron's books as a liability in the following way:

|                             |              |
|-----------------------------|--------------|
| Industrial bonds authorized | \$45,000,000 |
| Issued                      | 89,000,000   |
| Redeemed and canceled       | 3,626,000    |
|                             | 85,374,000   |
| Less—held in treasury       | 7,741,000    |
| Principal amount in default | 27,633,000   |

come mortgage bonds and 3,040 shares of stock of the new company.

On September 10, 1936, the petitioner, James Q. Newton, Jr., surrendered his Industrial bonds in the face amount of \$10,000 and received in exchange \$4,000 face amount of income mortgage bonds and 200 shares of stock in the new company.

On the date of exchange the fair market value of the securities of the new company received in exchange by petitioners was \$79 for each \$100 face amount of income mortgage bonds and \$27.25 for each share of stock. The total fair market value on the date of exchange of the securities of the new company received by the James Q. Newton trust was \$130,872, and the total fair market value on the date of exchange of the new securities received by James Q. Newton, Jr., was \$8,610.

### *Opinion*

Harron: The petitioners contend, that the reorganization of Fuel & Iron and Industrial under section 77B of the Bankruptcy Act, which resulted in an exchange of bonds of Industrial for bonds and stock of the new company, constituted a reorganization as defined in either provision (A) or (C) of section 112 (g) (1) <sup>2</sup> of the Revenue Act of 1936, so that recognition of gain or loss is precluded under section 112 (a) and (b) (3) <sup>3</sup> of the same act. The petitioners further contend that, if the transaction did not constitute a "reorganization" within the meaning of the above sections, nevertheless any gain resulting therefrom is nontaxable under section 112 (b) (5) of the Revenue Act of 1936.<sup>4</sup>

#### <sup>2</sup> SEC. 112. RECOGNITION OF GAIN OR LOSS.

(g) Definition of Reorganization.—As used in this section and section 113—

(1) The term "reorganization" means (A) a statutory merger or consolidation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in indemnity, form or place of organization, however effected.

#### <sup>3</sup> SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges Solely in Kind.—

(3) Stock for Stock or Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

#### <sup>4</sup> SEC. 112. RECOGNITION OF GAIN OR LOSS.

(b) Exchanges Solely in Kind.—

(5) Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange to two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

The respondent contends that there was not a "statutory merger or consolidation" within (A) of section 112 (g) (1), since the facts fail to show that the plan of reorganization under section 77B was executed by a merger or consolidation in pursuance of the laws of Colorado or Federal law. Respondent relies upon the statement in article 112 (g)-2 of Regulations 94 that, "The words 'statutory merger or consolidation' refer to a merger or a consolidation effected in pursuance of the corporation laws of the United States or a State or Territory or the District of Columbia." The respondent also contends that the reorganization under 77B of the Bankruptcy Act does not come within the definition of a reorganization in the applicable revenue act, within (C) of section 112 (g) (1). Respondent argues that the bondholders of Industrial may not be considered as the "stockholders of the transferor." He relies on the fact that stockholders of Fuel & Iron were given warrants to buy stock in the new company. But, conceding for purposes of argument, that the stockholders of the transferor lost their equity in the properties transferred to the new company and that this case comes within the rule of *Commissioner v. Kitselman*, 89 Fed. (2d) 458; certiorari denied, 302 U. S. 709, respondent argues that the opinion in *LeTulle v. Scofield*, 308 U. S. 415, strongly indicates that the 16 *Kitselman* case was wrongly decided. Respondent concedes that the facts in the *LeTulle* case differ from and are not analogous to the facts in the *Kitselman* case or in this case.

Petitioner urges at length that there was a "statutory" consolidation of Industrial and Fuel & Iron under a Federal statute namely, subsection (b) (9) of section 77B of the Bankruptcy Act. See United States Statutes at Large, 73d Cong., vol. 48-1, pp. 1912-1914.<sup>5</sup> We do not agree with this contention. First, in our opinion the Commissioner's statement in article 112 (g)-2 of Regulations 94, quoted above, appears to be correct and a statement of the obvious. Second, the power to effect a consolidation of corporations "must be derived from the law of the sovereignty or state which creates the corporation seeking to exercise it", Fletcher, *Cyclopedia of Corporations*, vol. 15, ch. 61, sec. 7048, and the steps and proceedings to effect a consolidation are formal and must be in accordance with the law of the jurisdiction. Fletcher, *Cyclopedia of Corporations*, supra, secs. 7066-7074. While a corporation formed to carry out steps in a plan of reorganization

<sup>5</sup> Sec. 77B. Corporate Reorganizations.—

(b) A plan of reorganization within the meaning of this section (9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation or to other corporations, or the consolidation of the properties of the debtor with those of another corporation, or the merger or consolidation of the debtor into or with another corporation or corporations, or

under section 77B of the Bankruptcy Act may be under the control of the Federal District Court having jurisdiction, a new corporation can come into existence only in compliance with state authority. *Old Fort Improvement Co. v. Lea*, 89 Fed. (2d) 286. In the proceedings involved here, the charter of the new company was obtained from the State of Colorado. The statutes of Colorado prescribe the way in which a consolidation may be consummated. *Comp. Laws of Colorado*, 1921, ch. 38 D., p. 754, sec. 2287; 1935 Colorado Stats. Ann., ch. 41 sec. 54. So far as the facts show, no articles of consolidation or merger were filed in the proper State office. The plan of reorganization approved by the District Court does not refer to a consolidation as the means of executing the plan. The provisions of subsection (b) (9) of section 77B of the Bankruptcy Act provided for several permissive methods of executing a plan of reorganization, among which are a merger or consolidation. But it may not be assumed that a "statutory merger or consolidation" was effected merely from the general facts relating to the way in which a reorganization under section 77B is executed. It is a matter to be proved whether such a plan of reorganization was executed by a statutory merger or consolidation, and, in our opinion, petitioner has not so proved in this case. See also Report of Committee on Ways and Means, No. 704, 73rd Cong., 2d sess., p. 14, for the reasons for inserting the word "statutory" before "merger or consolidation" in section 112 (g) (1) (A) of the Revenue Act of 1934.

However, we are of the opinion that the reorganization under section 77B of the Bankruptcy Act constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936, within (C) of section 112 (g) (1). In our opinion the situation here is very much like the situation in the *Kitselman* case, *supra*, and the question is controlled by that case. In the *Kitselman* case, after the various steps had been taken, the bondholders of the old company were in control of the new company, and this somewhat unusual situation presented difficulty because section 112 (g) (1) (C) predicates a reorganization on the requirement that the transferor or the stockholders of the transferor be in control of the new company. The court reasoned that where the old company is insolvent and its assets are transferred to a new company formed by the bondholders' representatives, the bondholders occupy a status somewhat akin to that of preferred stockholders, for all practical purposes. The court stated the following:

Bondholders ordinarily are viewed as creditors, but when the assets of the corporation are less than its obligations, the bond-



holders are in actuality and for all practical purposes pretty much the corporation. \* \* \*

It is clear that the bondholders were the moving spirit and were treated as the owners in fact, and it follows that they must be viewed as a class of "stockholders" somewhat akin to preferred stockholders with cumulative dividend rights. \* \* \* Where the assets of the corporation fall far below the amount required to pay the bondholders in full, the bondholders in bankruptcy reorganization supersede the stockholders. They acquire

18 the stockholders' rights to manage the corporate affairs. There is a difference between the position of stockholders in a case like the present one and stockholders of a corporation in bankruptcy proceeding under section 77B (U. S. C. A. § 207) to a reorganization, but the analogies are sufficient to justify a study of the decisions in the latter field.

The above reference in the quotation to a reorganization under section 77B of the Bankruptcy Act is significant here. In our opinion the situation in this case is as favorable, if not more favorable, to petitioner's contention than was the situation in the Kitselman case, because here there was a reorganization under section 77B of the Bankruptcy Act.

As in the Kitselman case, the difficulty is that of determining whether the holders of the Industrial bonds were the "transferor or its stockholders" within that clause in (C) of section 112 (g) (1). The situation is somewhat more complex here because there were two transferors, Industrial and Fuel & Iron, albeit they were subsidiary and parent corporations, and the holders of the Industrial bonds were creditors of both companies, Fuel & Iron having acquired substantially all the assets, securing the bonds under a first mortgage, and having unconditionally guaranteed the interest and principal of the bonds of Industrial. However, this complexity is not important, in our opinion. Neither the bondholders nor the stockholders of either of the old companies received any profit from the reorganization. The old companies transferred all their assets to the new company and immediately thereafter the old companies, through the bondholders, were in control of the corporation to which the assets were transferred. The holders of Industrial bonds were creditors having claims aggregating \$27,633,000 for principal due, and \$2,763,300 for interest due. They were the creditors with prior claims, secured by a first mortgage on assets in the hands of Fuel & Iron, and they were treated as the owners in fact of the assets transferred to the new company. It must follow here, as in the Kitselman case, that the holders of the Industrial bonds

be viewed, as a class of "stockholders." So viewed, they come within (C) of section 112 (g) (1).

The following is pointed out in support of the above conclusion.

19 Industrial and Fuel & Iron had been placed in receivership and had petitioned for a reorganization under section 77B of the Bankruptcy Act. The stockholders of both of the companies had lost their equity. This was recognized by the plan of reorganization, under which the entire ownership of the new company was turned over to the holders of Industrial bonds, and the stockholders were given, merely, warrants entitling them to purchase stock in the new company at a price considerably above the then market value. The treatment accorded various security holders of the old companies is described in the plan of reorganization as follows:

Under the Plan, the Industrial Bondholders are to receive for each \$1,000 principal amount of Bonds (together with the unpaid interest thereon which amounted to 10% to February 1, 1935): (a) \$400 principal amount of new 5% Income Mortgage Bonds and (b) 20 shares of new Common Stock. *The Industrial Bondholders are to receive all of the new Income Mortgage Bonds and all of the new Common Stock of the New Company to be presently issued in the reorganization.* The entire issue of Industrial Bonds outstanding in the aggregate principal amount of \$27,633,000 is in default. Interest on the Industrial Bonds accrued and unpaid to February 1, 1935, amounts to \$2,763,300. Accordingly, in the first instance, *the Plan gives to the holders of the Industrial Bonds the entire ownership and control of the New Company*, subject to \$4,500,000 of Fuel Bonds which are undisturbed in the reorganization.

The Plan, however, does not in its effect on stockholders operate as a strict foreclosure, since the stockholders are to receive Warrants entitling them at their option to purchase, at any time until February 1, 1950, a stock equity in the New Company at \$35 per share. The price at which stockholders, under the terms of such Warrants, may regain an equity position in the enterprise, takes into consideration the basis upon which the Industrial Bondholders are to receive shares of new Common Stock in exchange for that part of their debt not covered by new Income Mortgage bonds. [Italics supplied.]

20 The assets of the old companies were transferred to the new company, and immediately thereafter the bondholders were in control of the new company by virtue of the immediate transfer of 552,660 shares of stock of the new company to the reorganization managers, who were the agents of the bondholders. The holders of warrants to purchase new stock in the new company had no control. Control relates to

issued, not to authorized stock. *Louangel Holding Corporation v. Anderson*, 9 Fed. Supp. 550. *C. T. Investment Co. v. Commissioner*, 88 Fed. (2d) 582. Clearly there was an exchange of securities in one corporation a party to a reorganization, in pursuance of a plan of reorganization, solely for securities in another corporation a party to the reorganization. (Sec. 112 (b) (3).) All three corporations were parties to the reorganization. (Sec. 112 (g) (2).) The bondholders of Industrial retained a substantial stake or proprietary interest in the enterprise. There was a continuity of interest of the transferors in the transferee, evidenced by stocks and bonds of the new company. The holders of Industrial bonds acquired the stockholders' rights to manage the corporate affairs.

With respect to the argument of respondent that the opinion in the *LeTulle* case indicates that the decision in the *Kitselman* case is wrong, and that *Helvering v. Tyng*, 308 U. S. 527, also points that way, we believe the argument without merit. The fact that the bondholders herein retained a proprietary interest in the enterprise is a material difference between the factual situation in this case and the factual situation in either the *LeTulle* case or the *Tyng* case. Such cases are therefore clearly distinguishable and not applicable here. In the *LeTulle* case when a stockholder of the transferor received bonds and cash of the transferee in exchange for his stocks, there was no continuity of interest. In the *Tyng* case, where the stockholders of the transferors received cash and long-term indebtedness of the transferee in exchange for their stock, there was no continuity of interest. In both the *LeTulle* case and the *Tyng* case stockholders of the transferor became mere creditors and the transferee, whereas in this case creditors (the Industrial bondholders) became stockholders of the transferee, and after the transfer they were in control of the corporation to which the assets were transferred. Also, we believe that *E. P. Raymond*, 37 B. T. A. 423, cited by respondent, is not applicable here. The point in this case is that the bondholders received all the presently issued stock of the new company, thereby gaining control thereof.

It is held that the reorganization under section 77B of the Bankruptcy Act was executed so as to constitute a reorganization as defined in section 112 (g) (1) (C), and the gain or loss resulting therefrom is not recognizable under section 112 (b) (3). See also *Commissioner v. Newberry Lumber & Chemical Co.*, 94 Fed. (2d) 447; *Marlborough House, Inc.*, 40 B. T. A. 882; *Edith M. Greenwood*, 41 B. T. A. 664; *Alabama Asphaltic Limestone Co.*, 41 B. T. A. 324.

In view of the foregoing it is not necessary to consider whether or not the transactions come within section 112 (b) (5).

18-4 GUY T. HELVERING VS. JAMES Q. NEWTON TRUST

Reviewed by the Board.

Decision will be entered under Rule 50.

VAN FOSSAN, LEECH, TURNER, and DISNEY dissent.

MURDOCK dissents for reasons expressed in his dissent in Alabama Asphaltic Limestone Co., 42 B. T. A. 324.

Before United States Board of Tax Appeals

*Decision*

Pursuant to the Board's Findings of Fact and Opinion promulgated August 6, 1940, the petitioner herein having on September 4, 1940, filed a recomputation of tax, and the respondent having agreed thereto, now, therefore, it is

Ordered and Decided: That there is an overpayment in income tax for the year 1936 in the amount of \$29,994.07 which amount was paid within three years before the filing of the petition (Sec. 809 (a), Revenue Act of 1938).

(s) MARION J. HARRON,  
Member.

Entered Sept. 6, 1940.

In United States Circuit Court of Appeals

*Petition for review and assignments of error*

Filed Nov. 26, 1940

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

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I

*Jurisdiction*

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States; that the respondent on review, James Q. Newton Trust (hereinafter sometimes referred to as the taxpayer), is a fiduciary trust having its principal office at 828 Seventeenth Street, Denver, Colorado. The taxpayer filed its Federal fiduciary return of income (Form 1041) and its Federal individual income tax return (Form 1040) for



the year 1936 with the Collector of Internal Revenue for the District of Colorado, whose office is located in the City of Denver, Colorado, and within the judicial circuit of the United States Circuit Court of Appeals for the Tenth Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

## II

### Prior Proceedings

On December 3, 1938, the Commissioner determined a deficiency in Federal income tax liability against the taxpayer for the year 1936 in the amount of \$12,325.60 and sent to the taxpayer, by registered mail, a notice of said deficiency in accordance with the provisions of existing internal revenue laws. Thereafter and on March 2, 1939, the taxpayer filed an appeal from said determination of the Commissioner with the United States Board of Tax Appeals.

The case was duly tried to the United States Board of Tax Appeals and on August 6, 1940, the Board promulgated its findings of fact and opinion (42 B. T. A. — No. 73), pursuant to which opinion decision was entered on September 6, 1940, wherein and whereby it was ordered and decided that there is an overpayment in income tax for the year 1936 in the amount of \$29,994.07.

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## III

### Nature of Controversy

Prior to September 10, 1936, the taxpayer trust was the owner of \$152,000 face amount of first mortgage 5 percent bonds of the Colorado Industrial Company, a Colorado corporation (hereinafter referred to as Industrial), which bonds were due on August 1, 1934. The capital stock of Industrial was wholly owned by the Colorado Fuel & Iron Company (hereinafter called Fuel & Iron) and its bonds were unconditionally guaranteed as to principal and interest by the latter company. Industrial's bonds of the face amount of \$27,633,000 were held by the public on August 1, 1934, and \$7,741,000 face amount thereof was held by Fuel & Iron. Industrial defaulted in the payment of interest on its bonds on August 1, 1933, and on subsequent interest installments, and Fuel & Iron defaulted under its guarantee of interest payments.

In 1933 Fuel & Iron had \$4,500,000 face amount of general mortgage 5 percent bonds outstanding in the hands of the

public. It defaulted in the payment of the semi-annual interest due on those bonds on August 1, 1933. On the latter date a receiver was appointed for Fuel & Iron's properties by the United States District Courts of Colorado and Wyoming. When the two corporations later defaulted on Industrial's first mortgage 5 percent bonds, on August 1, 1934, each company filed a petition with the United States District Court of Colorado seeking a reorganization under Section 77B of the Federal Bankruptcy Act, whereupon the receiver previously appointed for Fuel & Iron was appointed trustee of the properties of both companies. On April 25, 1936, the District Court confirmed a plan of reorganization previously filed with the Court and accepted by a majority of Industrial's bondholders and Fuel & Iron's common and preferred stockholders. The Court approved the certificate of incorporation of a new corporation, the Colorado Fuel & Iron Corporation, and on June 20, 1936, entered its order directing, among other things, the transfer of all of the assets of Fuel & Iron and Industrial to the new corporation which was done, as of July 1, 1936, by the execution of proper conveyances.

Under the plan of reorganization as approved by the Court, the only stock of the new company to be issued was  
24 552,660 shares which were to be issued to the holders of Industrial's bonds in exchange. Pursuant to the plan the new company issued 552,660 shares of its stock to be distributed to the holders of Industrial's bonds, reserved 315,379 shares to be applied against warrants which it issued, in accordance with the plan, to the preferred and common stockholders of Fuel & Iron, and reserved the remaining 131,961 shares for corporate purposes. The warrants were issued, under the plan, to enable Fuel & Iron's stockholders to regain an interest in the enterprise, if they so desired, at \$35 a share on or before April 1, 1950, but the warrant agreement filed with the Chase National Bank of New York, warrant agent, provided that the holders of warrants should have no rights whatsoever as stockholders of the new company. During the year 1936, only 37 shares of stock of the new company were issued by reason of the exercise of warrants. The new company also issued, pursuant to the plan, \$11,053,200 principal amount of five percent income mortgage bonds due April 1, 1970, to be distributed to Industrial's bondholders, and assumed payment of the \$4,500,000 face amount of Fuel & Iron's general bonds. Industrial's bondholders thereupon gained the entire ownership and control of the new company subject to the \$4,500,000 bonds of Fuel & Iron which were not disturbed in the reorganization.

On September 10, 1936, the taxpayer surrendered its Industrial bonds in the face amount of \$152,000 and received therefor \$60,800 face amount of income mortgage bonds and 3,040 shares of stock of the new company. In his notice of deficiency the Commissioner treated the exchange as a taxable one. The taxpayer contended that the Section 77B reorganization of Fuel & Iron and Industrial constituted a nontaxable reorganization under Section 112 of the Revenue Act of 1936. The Board of Tax Appeals agreed with the taxpayer's contention and redetermined the tax liability accordingly.

#### IV

#### Assignments of Error

The Commissioner avers that in the record and proceedings before the United States Board of Tax Appeals and in the opinion and final decision rendered and entered by the United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner, who now assigns the following errors and each of them, which he avers occurred in said record, proceedings, opinion, and final decision so rendered and entered by the United States Board of Tax Appeals:

The United States Board of Tax Appeals erred—

1. In ordering and deciding that there is an overpayment in income tax for the year 1936 in the amount of \$29,994.07.
2. In failing to sustain the deficiency determined by the Commissioner, less a proper reduction of said deficiency to reflect the adjustment agreed upon by the parties at the hearing before the United States Board of Tax Appeals.
3. In holding and deciding that the reorganization under Section 77B of the Bankruptcy Act constituted a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).
4. In failing to hold and decide that the reorganization under Section 77B of the Bankruptcy Act did not constitute a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).
5. In holding that there was a continuity of interest of the transferors in the transferee within the scope and meaning of Section 112 (g) (1) (C) of the Revenue Act of 1936.
6. In holding and deciding that the gain resulting to the taxpayer from the exchange was not recognizable under Section 112 (b) (3).

7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Tenth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of that Court and transmitted to the Clerk of said Court for filing, and that appropriate action to  
26 be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(S) SAMUEL O. CLARK, Jr.,  
*Assistant Attorney General.*

(Signed) J. P. WENCHEL,  
R. L. W.  
J. P. Wenchel,

*Chief Counsel,  
Bureau of Internal Revenue.*

Of Counsel:

CHARLES E. LOWERY,  
*Special Attorney,  
Bureau of Internal Revenue.*

[Verification omitted.]

[File endorsement omitted.]

*Notice of filing petition for review*

Filed Dec. 2, 1940

To Richard M. Davis, Esq., Quigg Newton, Jr., Esq., Colorado  
National Bank Building, Denver, Colorado:

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of November 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of errors as filed is hereto attached and served upon you.

Dated this 26th day of November 1940.

B. D. GAMBLE,  
*Clerk,*

*United States Board of Tax Appeals.*

Service of the above and foregoing notice, together with a copy of the petition for review and assignments of error



mentioned therein is hereby acknowledged this 29th day of November 1940.

(s) RICHARD M. DAVIS,

(s) QUIGG NEWTON, Jr.,

*Counsel for Respondent on Review.*

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*Notice of filing petition for review*

Filed Dec. 5, 1940

To James Q. Newton Trust, 828 Seventeenth Street, Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of November 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 26th day of November 1940.

(Signed) J. P. WENCHEL,

R. L. W.

J. P. Wenchel,

*Chief Counsel,*

*Bureau of Internal Revenue.*

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of November 1940.

JAMES Q. NEWTON TRUST,

By JAMES Q. NEWTON, Jr.,

*Trustee,*

*Respondent on Review.*

[File endorsement omitted.]

Before United States Board of Tax Appeals

*Stipulation of facts*

(Filed at Hearing September 21, 1939)

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following is a true statement of the facts herein involved:

1. Petitioner is, and at all times herein mentioned was, a fiduciary trust, with its principal office at 828 Seventeenth Street, Denver, Colorado. The fiduciary income tax return and the amended return filed on Form 1040 herein involved (copies of which marked, respectively, Exhibits "A" and "B," are  
28 attached hereto and by this reference made a part hereof) were filed with the Collector of Internal Revenue for the District of Colorado, at Denver, Colorado. At all times herein mentioned Petitioner has kept its books and filed its returns on a cash receipts and disbursements basis.

2. The notice of deficiency (copy of which is attached hereto marked Exhibit "C"), was mailed to Petitioner on December 3, 1938.

3. The taxes in controversy consist of income taxes for the calendar year 1936 in two amounts:

(a) The amount of \$29,994.07 which Petitioner paid under protest upon filing its amended return and which Petitioner claims is an overpayment.

(b) The amount of \$12,325.60 being the deficiency determined by the Respondent's notice of deficiency.

The total amount in controversy, therefore, is \$42,319.67.

4. On March 12, 1935, there was filed in the District Court of the United States, for the District of Colorado, In the Matter of The Colorado Fuel and Iron Company and Another, Colorado Corporations, Debtors, Consolidated Cause No. 8081, a Plan of Reorganization (a copy of which, marked "Exhibit D" is attached hereto and by reference made a part hereof). At that time The Colorado Fuel and Iron Company had outstanding its own General Mortgage Five Per Cent. Bonds, preferred stock and common stock, and it was also the guarantor on the First Mortgage Five Per Cent Bonds of The Colorado Industrial Company, a wholly owned subsidiary. These bonds of the Colorado Industrial Company were its only securities outstanding in the hands of the public. Both of these corporations were before the Court on their petitions for reorganization under Section 77-B of the Bankruptcy Act, filed August 1, 1934.

5. On March 12, 1935, the Court entered its order finding that the Plan had been proposed in accordance with the provisions of Section 77-B and ordering that the holders of Colorado Industrial Company Bonds and the preferred and common stockholders of The Colorado Fuel and Iron Company be notified of the Plan and given the opportunity to express their acceptance thereof. Copies of said Order and of the form of acceptance for bonds is registered and in bearer form, marked  
29

Exhibits "E," "F," and "G," are attached hereto and by this reference made a part hereof.

6. On April 25, 1936 the Court entered its Findings of Fact and Conclusions of Law and its Order confirming the Plan of Reorganization and finding that it was fair and equitable and did not discriminate unfairly in favor of any class of creditors or stockholders. A copy of these Findings, Conclusions and Order, marked Exhibit "H", is attached hereto and by this reference made a part hereof. The Plan of Reorganization, as so approved, provided that a new company should be organized with an authorized capital of 1,000,000 shares of stock and \$11,053,200.00 Five Per Cent. Income Mortgage Bonds. The new company was to assume the payment of the General Mortgage Five Per Cent. Bonds of The Colorado Fuel and Iron Company. It was to issue \$11,053,200.00 of its Income Mortgage Bonds and 552,660 shares of its stock in exchange for the bonds of The Colorado Industrial Company guaranteed by The Colorado Fuel and Iron Company, in the ratio of \$400.00 face value of new bonds and 20 shares of stock for each \$1,000.00 face amount of Colorado Industrial Company bonds. Since the Industrial Company bonds were then in default on both principal and interest, such 552,660 shares issued to the holders of Industrial Bonds were the only shares of the new company to be presently issued. The new company was to give to the preferred and common stockholders of the old Colorado Fuel and Iron Company merely warrants to purchase certain specified amounts of stock of the new company at \$35.00 per share on or before February 1, 1950, which option price was considerably higher than the opening market price for shares of the new company. Three Hundred fifteen thousand, three hundred seventy-nine shares of stock of the new company were reserved for this purpose. Thus, the Plan provided that 1,000,000 shares of the new company should be authorized. Of this number, 552,660 shares were to be issued to the holders of Industrial Bonds; 315,379 shares were to be reserved to apply against warrants, when, as and if the  
30 option were exercised; and the remaining 131,961 shares were reserved for corporate purposes.

7. In pursuance of the Plan of Reorganization and the Orders of April 25, 1936, the new company, The Colorado Fuel and Iron Corporation, was organized under the laws of the State of Colorado, and on June 20, 1936, the Court entered its Order approving the form of documents and directing the transfer of assets to, and the issuance of securities and assumption of liabilities by, the new company. A copy of this Order, marked "Ex-

hibit I," is attached hereto and by this reference made a part hereof. It provided that on July 1, 1936, The Colorado Fuel and Iron Company, The Colorado Industrial Company, Arthur Roeder, Trustee of the assets of both, and The New York Trust Company, as Trustee under the Colorado Industrial Company mortgage, should convey to The Colorado Fuel and Iron Corporation all their right, title and interest in all of the assets of The Colorado Fuel and Iron Company and the Colorado Industrial Company. Simultaneously, or promptly thereafter, The Colorado Fuel and Iron Corporation was directed to deliver to, or on the order of, the Reorganization Managers \$11,053,200.00 of its Income Bonds, 552,660 shares of its stock and warrants representing the right to purchase 315,379 shares of its stock. Simultaneously, or promptly thereafter, The New York Trust Company, as Trustee of this first mortgage of the Industrial Company, was directed to execute a satisfaction and discharge of the First Mortgage of the Industrial Company. As soon as reasonably practicable, the Reorganization Managers were directed to distribute to the holders of Industrial Bonds the new Income Bonds and all of the stock of the new company to be issued, and to distribute to the preferred and common stockholders of the old company warrants to purchase stock in accordance with the terms of the warrant agreement. A copy of said warrant agreement, marked "Exhibit J," is attached hereto and made a part hereof.

8. The order further provided as follows (Ar. Two, Par. F, p. 7):

31 "The provisions of this Order directing the transfer and delivery of the properties and assets of the Debtors to the New Company, the assumption by the New Company of certain obligations of the Debtors and of the Trustee as hereinabove and in Article Three hereof provided, and the issue by the New Company to or on the order of, and the distribution by, the Reorganization Managers of the New Securities, shall be a single and entire order and direction, notwithstanding the provisions hereof permitting the transfer of said properties and assets forthwith and without awaiting the assumption by the New Company of said liabilities or the issue, delivery and distribution of the New Securities."

Similarly it directed that any dividends or interest paid with respect to any of the new securities during the period when such new securities were held by the Reorganization Managers or distributing agents should be held by them and paid to the



holders of the Industrial Bonds as soon as the physical exchange was effected.

9. Pursuant to Article Five of said Order of June 20th, the Reorganization Managers gave notice to the holders of Industrial Bonds that the new securities would be available for distribution on September 1, 1936. A copy of this notice, marked "Exhibit K," is attached hereto and by this reference made a part hereof. Thereafter on September 10, 1936, Petitioner surrendered its \$152,000.00 face amount of Colorado Industrial Company First Mortgage Five Per Cent Bonds in exchange for \$60,800.00 face amount of the Income Mortgage Bonds and 3,040 shares of the stock of The Colorado Fuel and Iron Corporation. At the same time and in due course the other holders of Industrial Bonds surrendered their certificates for cancellation in exchange for Income Bonds and shares of stock in the new company upon the same basis as provided in the Plan.

10. Pursuant to the Order of June 20, 1936, the properties of The Colorado Fuel and Iron Company and the Colorado Industrial Company, and all the right, title, and interest of the Trustees under the Industrial Company Mortgage were transferred to the new company as of July 1, 1936, as is recited in the final report of the Reorganization Trustee, dated September 12, 1938, 32 and filed September 13, 1938. A copy of said conveyance, marked "Exhibit L," and an extract from said report, marked "Exhibit M," are attached hereto and by this reference made a part hereof. By June 30, 1938, \$11,029,200.00 face value Income Bonds and 551,460 shares of stock in the new company had been distributed in exchange for Industrial Bonds pursuant to the Plan and the Order of April 25, 1936, leaving only \$24,000.00 face value of Income Bonds and 1,200 shares of stock still to be distributed. On the same date all but 1,714 shares of preferred stock in the old company, out of 20,000 shares, and all but 20,572 shares of common stock in the old company, out of 340,505 shares, had been exchanged for warrants. On the same date only 465 shares of stock in the new company had been issued for cash upon the exercise of the warrants, all as recited in Exhibit "M," the extract from the Final Report of the Trustee. The first exercise of the warrant options for purchase of stock in the new company occurred on October 23, 1936, and it was for 37 shares.

11. Immediately after the consummation of the plan of liquidation, 552,660 shares of stock of the new company were issued, and all of these shares belonged to the holders of Industrial

Bonds in accordance with the provisions of the Plan and the order of April 25, 1936. No stock was issued to parties other than the Industrial bondholders until October 23, 1936, and by June 30, 1938, only 465 shares had been issued to other parties (the 465 shares referred to above as issued upon the exercise of warrants). The warrant agreement, Exhibit "J," provided, in Article Twelve thereof, that the holders of warrants should not have the right to vote or to receive notice as stockholders, nor should they have any rights whatsoever as stockholders.

12. On the date of exchange the fair market value of the securities received in exchange for Industrial Bonds was \$79.00 for each \$100.00 face amount of Income Bonds and \$27.25 for each share of stock in the new company, a total of \$130,872.00.

By Order of Court, dated October 12, 1938, and filed November 13, 1938, copy of which, marked "Exhibit N," is attached  
33 hereto and by this reference made a part hereof, the reorganization proceedings were concluded and the Trustee discharged.

It Is Further Stipulated And Agreed that either party hereto may introduce such further and additional evidence, not inconsistent with the facts above stipulated, as may be material to any of the issues herein, and that the exhibits attached hereto and referred to herein may be given the same force and effect as if the same had been duly offered and received in evidence in open court.

Dated this 19th day of September 1939.

QUIGG NEWTON, JR.,  
Quigg Newton, Jr.,

RICHARD M. DAVIS,

Richard M. Davis,

*Counsel for Petitioner,*

J. P. WENCHEL,

R. L. W., J. P. Wenchel,

*Chief Council, Bureau*

*Internal Revenue.*

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**Exhibit A**

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IDENTIFIED

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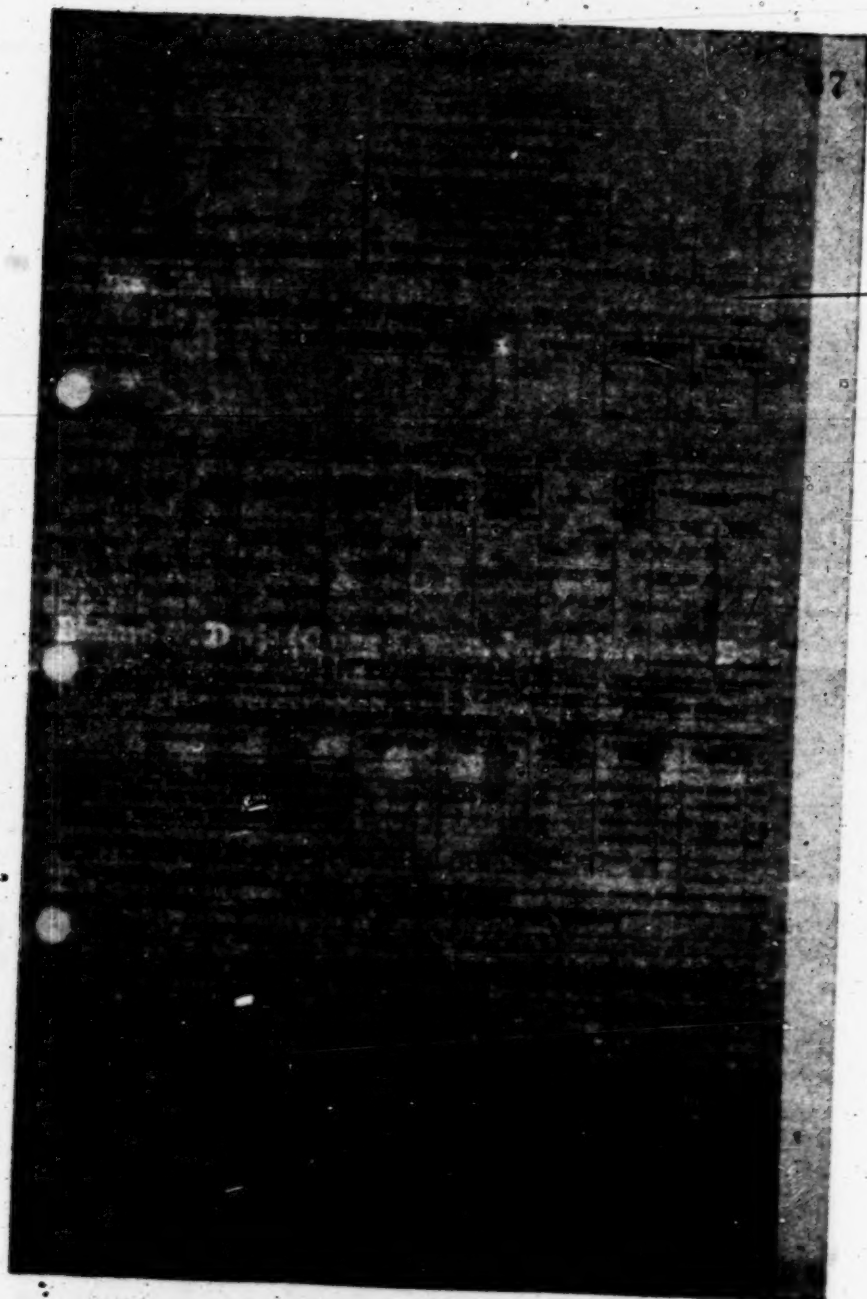
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## 39 JAMES Q. NEWTON TRUST—CAPITAL GAINS &amp; LOSSES

1936

## SCHEDULE D

| Security                     | Sold        |                   | Bought     |                    | Gain or loss |
|------------------------------|-------------|-------------------|------------|--------------------|--------------|
|                              | Date        | Cost              | Date       | Sale price         |              |
| (a) (Under one year):        |             |                   |            |                    |              |
| 200 Sears Roebuck & Co.      | 1- 6-36     | \$11,996.75       | 10-23-35   | \$11,985.90        | \$11.75      |
| 200 Sears Roebuck & Co.      | 1- 6-36     | 11,996.76         | 11- 2-35   | 12,035.00          | 38.24        |
| 500 Standard Oil N. J.       | 1-16-36     | 26,885.71         | 12-27-35   | 24,700.00          | 2,185.71     |
| 100 Pullman                  | 2-14-36     | 4,625.90          | 1-27-36    | 4,290.00           | 335.90       |
| 500 U. S. Steel              | 2-14-36     | 28,925.41         | 1-16-36    | 24,450.00          | 4,475.41     |
| 500 Holly Sugar              | 3-21-36     | 17,079.65         | 1-13-36    | 10,437.50          | 6,642.15     |
| 500 Standard Oil Calif.      | 3-21-36     | 22,729.53         | 2-20-36    | 23,387.50          | 657.97       |
| 500 Standard Oil Indiana     | 3-25-36     | 19,148.36         | 4-23-35    | 12,762.50          | 6,385.86     |
| 500 Bethlehem Steel          | 3-25-36     | 28,116.93         | 2-20-36    | 29,462.50          | 1,345.57     |
| 500 Swift & Co.              | 3-25-36     | 11,411.02         | 2-10-36    | 12,187.50          | 776.48       |
| 200 Cluett-Prabody           | 3-25-36     | 12,746.74         | 1-17-36    | 11,235.00          | 1,511.74     |
| 500 American Metals          | 3-25-36     | 17,004.65         | 11-18-35   | 15,362.50          | 1,642.15     |
| 100 American Sumatra Tob.    | 3-25-36     | 2,453.45          | 1-27-36    | 2,565.00           | 111.55       |
| 100 Texas Corp.              | 5- 8-36     | 3,379.68          | 4-30-36    | 3,252.50           | 127.18       |
| 100 General Motors           | 5- 8-36     | 6,327.87          | 4-30-36    | 5,955.00           | 372.87       |
| 200 Standard Oil Indiana     | 5- 8-36     | 6,946.86          | 4-30-36    | 6,805.00           | 141.86       |
| 100 U. S. Steel              | 5- 8-36     | 5,508.38          | 4-30-36    | 5,617.50           | 19.12        |
| 500 Great Western Sugar      | 7-23-36     | 17,729.63         | 4-22-36    | 16,937.50          | 792.13       |
| 300 Holly Sugar              | 6-30-36     | 10,527.57         | 6-17-36    | 9,895.00           | 632.57       |
| 200 Electric Auto Lite       | 6-30-36     | 7,073.84          | 4-30-36    | 6,755.00           | 318.84       |
| 500 Allied Stores            | 7-13-36     | 6,080.87          | 7- 9-36    | 5,312.50           | 777.37       |
| 500 Electric Bond & Share    | 7-29-36     | 13,190.97         | 4-22-36    | 10,500.00          | 2,690.97     |
| 500 Radio                    | 8-13-36     | 5,402.39          | 6-11-36    | 6,312.50           | 910.11       |
| 200 Bethlehem Steel          | 8-21-36     | 11,871.76         | 6-16-36    | 10,935.00          | 936.76       |
| 500 Northwest Bancorp.       | 8-22-36     | 4,692.50          | 5-18-36    | 5,850.00           | 1,157.50     |
| 500 Middle West Corp.        | 9-10-36     | 6,248.87          | 4-22-36    | 4,150.00           | 2,098.87     |
| 200 American Sugar Refg.     | 9-10-36     | 11,946.76         | 8-27-36    | 11,910.00          | 36.76        |
| 200 Servel                   | 9-10-36     | 5,036.79          | 6-23-36    | 4,775.00           | 261.79       |
| 200 Cont'l Oil               | 9-10-36     | 6,011.37          | 6-23-36    | 6,105.00           | 93.63        |
| 500 Allied Stores            | 9-10-36     | 6,414.86          | 8-25-36    | 6,437.50           | 22.64        |
| 500 Speery VTC               | 9-10-36     | 10,354.54         | 8-25-36    | 10,625.00          | 270.46       |
| 1000 South Amer Gold & Plat. | 10- 3-36    | 4,664.50          | 2- 5-36    | 5,762.50           | 1,118.00     |
| 500 General Motors           | 10-13-36    | 26,294.87         | 4-30-36    | 25,775.00          | 489.27       |
| 500 Bethlehem Steel          | 10-13-36    | 37,479.23         | 10- 3-36   | 36,337.50          | 1,141.73     |
| 500 Pure Oil                 | 10-13-36    | 9,114.80          | 8-25-36    | 8,562.50           | 552.30       |
| 500 New York Central         | 11- 7-36    | 23,267.00         | 10-16-36   | 24,250.00          | 1,982.96     |
| 500 Republic Steel           | 11- 7-36    | 12,442.22         | 10-19-36   | 12,937.50          | 495.28       |
| 300 Standard Oil Indiana     | 11- 7-36    | 13,138.98         | 9-29-36    | 11,370.00          | 1,768.98     |
| 200 Standard Oil Indiana     | 11- 7-36    | 8,771.82          | 7-14-36    | 7,355.00           | 1,416.82     |
| 3000 Callahan Zinc & Lead    | 11- 7-36    | 3,808.71          | 10- 3-36   | 4,725.00           | 916.29       |
| 200 Colgate Palmolive Peet   | 11- 7-36    | 3,460.93          | 9-28-36    | 3,075.00           | 385.93       |
| 200 Waukesha Motor Co.       | 11- 7-36    | 7,586.34          | 10-10-36   | 5,517.50           | 2,068.84     |
| 200 Pullman                  | 11-12-36    | 11,746.76         | 6- 3-36    | 9,605.00           | 2,141.76     |
| 100 Godchaux Sugar           | 11-14-36    | 2,625.94          | 8-31-36    | 1,887.50           | 738.44       |
| 200 Pullman                  | 12-18-36    | 12,771.74         | 11-28-36   | 12,035.00          | 736.74       |
| 100 Van Rente                | 6-30-36     | 3,818.17          | 4-30-36    | 3,415.00           | 403.17       |
| Total gain                   | (100%)      |                   |            |                    |              |
| Total loss                   | (100%)      |                   |            |                    |              |
| (b) (1-2 years):             |             |                   |            |                    |              |
| 120 Radio \$3.50 Pfd.        | 8-15-36     | 8,929.58          | 5- 6-35    | 4,331.06           | 4,598.52     |
| 100 Radio Common             | 8-13-36     | 1,080.47          | 5-30-35    | 583.94             | 496.53       |
| 500 Tintic Standard Mng.     | 2-14-36     | 3,040.80          | 2-14-34    | 3,800.00           | 450.20       |
| 500 United Air Lines         | 3-21-36     | 9,621.30          | 12-27-34   | 2,975.00           | 6,646.30     |
| 50 Illegible                 | 11-14-36    | Figures illegible |            | 2,752.50           | 1,334.70     |
| Totals                       | (80%)       |                   |            |                    |              |
| (c) (2-5 years):             |             |                   |            |                    |              |
| 50 Ingersoll Rand            | 4-19-36     | 8,276.62          | 1-17-34    | 3,388.25           | 4,888.37     |
| 5 Cache La Poudre            | 10-16-36    | 151.02            | 1-16-34    | 120.65             | 30.37        |
| Totals                       | (60%)       |                   |            |                    |              |
| (d) (5-10 years):            |             |                   |            |                    |              |
| 250 Claude Neon Lights       | 1936        |                   | 1936       | Final distribution | 290.00       |
| 9M Reynolds Investing 5%     | 1928 & Y-36 | 7,488.74          | 1928 & '29 | 9,870.83           | 1,288.09     |
| Totals                       | (40%)       |                   |            |                    |              |

TREASURY DEPARTMENT,  
OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,  
*Denver, Colorado, March 16, 1937.*

IT Circular #61-FY.  
IT:GES.

JAMES Q. NEWTON TRUST,  
*% Boettcher & Company, 828 17th Street,  
Denver, Colorado.*

In reply to your request of recent date, an extension of time to May 1, 1937 is hereby granted in which to file your income tax return for the year ending December 31, 1936.

Where an extension of time for filing a return is granted, the time for the payment of the first installment is postponed for the period of the extension, and under the Revenue Law, there is to be added as part of such installment, interest at the rate of 6% per annum from the original due date of such installment to the date of payment.

This extension does not apply to information returns, Forms 1096 and 1099, covering reports of payments of salaries, wages, rents, etc.

It is necessary that a copy of this letter be attached to your return as authority for the extension herein granted.

Respectfully,

GUY T. HELVERING,  
*Commissioner,*  
By RALPH NICHOLAS,  
*Collector.*

Enclosure: CC

48

## Exhibit B

**INDIVIDUAL INCOME TAX RETURN**  
For Calendar Year 1934

**1. Name of taxpayer** GUY T. HELVERING

**2. Address** 1000 Broadway, New York, N. Y.

**3. Occupation** Investor

**4. Filing status** Single

**5. Dependents** None

**6. Gross income** 100,000.00

**7. Deductions** None

**8. Taxable income** 100,000.00

**9. Tax** 10,000.00

**10. Refund** None

**11. Total** 110,000.00

**12. Signature** Guy T. Helvering

**13. Date** May 1, 1935

**14. Preparer** None

**15. Remarks** None

**16. Notes** None

**17. Attachments** None

**18. Other** None

**19. Total** 110,000.00

**20. Signature** Guy T. Helvering

**21. Date** May 1, 1935

**22. Preparer** None

**23. Remarks** None

**24. Notes** None

**25. Attachments** None

**26. Other** None

**27. Total** 110,000.00

**28. Signature** Guy T. Helvering

**29. Date** May 1, 1935

**30. Preparer** None

**31. Remarks** None

**32. Notes** None

**33. Attachments** None

**34. Other** None

**35. Total** 110,000.00

**36. Signature** Guy T. Helvering

**37. Date** May 1, 1935

**38. Preparer** None

**39. Remarks** None

**40. Notes** None

**41. Attachments** None

**42. Other** None

**43. Total** 110,000.00

**44. Signature** Guy T. Helvering

**45. Date** May 1, 1935

**46. Preparer** None

**47. Remarks** None

**48. Notes** None

**49. Attachments** None

**50. Other** None

**51. Total** 110,000.00

**52. Signature** Guy T. Helvering

**53. Date** May 1, 1935

**54. Preparer** None

**55. Remarks** None

**56. Notes** None

**57. Attachments** None

**58. Other** None

**59. Total** 110,000.00

**60. Signature** Guy T. Helvering

**61. Date** May 1, 1935

**62. Preparer** None

**63. Remarks** None

**64. Notes** None

**65. Attachments** None

**66. Other** None

**67. Total** 110,000.00

**68. Signature** Guy T. Helvering

**69. Date** May 1, 1935

**70. Preparer** None

**71. Remarks** None

**72. Notes** None

**73. Attachments** None

**74. Other** None

**75. Total** 110,000.00

**76. Signature** Guy T. Helvering

**77. Date** May 1, 1935

**78. Preparer** None

**79. Remarks** None

**80. Notes** None

**81. Attachments** None

**82. Other** None

**83. Total** 110,000.00

**84. Signature** Guy T. Helvering

**85. Date** May 1, 1935

**86. Preparer** None

**87. Remarks** None

**88. Notes** None

**89. Attachments** None

**90. Other** None

**91. Total** 110,000.00

**92. Signature** Guy T. Helvering

**93. Date** May 1, 1935

**94. Preparer** None

**95. Remarks** None

**96. Notes** None

**97. Attachments** None

**98. Other** None

**99. Total** 110,000.00

**100. Signature** Guy T. Helvering

**101. Date** May 1, 1935

**102. Preparer** None

**103. Remarks** None

**104. Notes** None

**105. Attachments** None

**106. Other** None

**107. Total** 110,000.00

**108. Signature** Guy T. Helvering

**109. Date** May 1, 1935

**110. Preparer** None

**111. Remarks** None

**112. Notes** None

**113. Attachments** None

**114. Other** None

**115. Total** 110,000.00

**116. Signature** Guy T. Helvering

**117. Date** May 1, 1935

**118. Preparer** None

**119. Remarks** None

**120. Notes** None

**121. Attachments** None

**122. Other** None

**123. Total** 110,000.00

**124. Signature** Guy T. Helvering

**125. Date** May 1, 1935

**126. Preparer** None

**127. Remarks** None

**128. Notes** None

**129. Attachments** None

**130. Other** None

**131. Total** 110,000.00

**132. Signature** Guy T. Helvering

**133. Date** May 1, 1935

**134. Preparer** None

**135. Remarks** None

**136. Notes** None

**137. Attachments** None

**138. Other** None

**139. Total** 110,000.00

**140. Signature** Guy T. Helvering

**141. Date** May 1, 1935

**142. Preparer** None

**143. Remarks** None

**144. Notes** None

**145. Attachments** None

**146. Other** None

**147. Total** 110,000.00

**148. Signature** Guy T. Helvering

**149. Date** May 1, 1935

**150. Preparer** None

**151. Remarks** None

**152. Notes** None

**153. Attachments** None

**154. Other** None

**155. Total** 110,000.00

**156. Signature** Guy T. Helvering

**157. Date** May 1, 1935

**158. Preparer** None

**159. Remarks** None

**160. Notes** None

**161. Attachments** None

**162. Other** None

**163. Total** 110,000.00

**164. Signature** Guy T. Helvering

**165. Date** May 1, 1935

**166. Preparer** None

**167. Remarks** None

**168. Notes** None

**169. Attachments** None

**170. Other** None

**171. Total** 110,000.00

**172. Signature** Guy T. Helvering

**173. Date** May 1, 1935

**174. Preparer** None

**175. Remarks** None

**176. Notes** None

**177. Attachments** None

**178. Other** None

**179. Total** 110,000.00

**180. Signature** Guy T. Helvering

**181. Date** May 1, 1935

**182. Preparer** None

**183. Remarks** None

**184. Notes** None

**185. Attachments** None

**186. Other** None

**187. Total** 110,000.00

**188. Signature** Guy T. Helvering

**189. Date** May 1, 1935

**190. Preparer** None

**191. Remarks** None

**192. Notes** None

**193. Attachments** None

**194. Other** None

**195. Total** 110,000.00

**196. Signature** Guy T. Helvering

**197. Date** May 1, 1935

**198. Preparer** None

**199. Remarks** None

**200. Notes** None

**201. Attachments** None

**202. Other** None

**203. Total** 110,000.00

**204. Signature** Guy T. Helvering

**205. Date** May 1, 1935

**206. Preparer** None

**207. Remarks** None

**208. Notes** None

**209. Attachments** None

**210. Other** None

**211. Total** 110,000.00

**212. Signature** Guy T. Helvering

**213. Date** May 1, 1935

**214. Preparer** None

**215. Remarks** None

**216. Notes** None

**217. Attachments** None

**218. Other** None

**219. Total** 110,000.00

**220. Signature** Guy T. Helvering

**221. Date** May 1, 1935

**222. Preparer** None

**223. Remarks** None

**224. Notes** None

**225. Attachments** None

**226. Other** None

**227. Total** 110,000.00

**228. Signature** Guy T. Helvering

**229. Date** May 1, 1935

**230. Preparer** None

**231. Remarks** None

**232. Notes** None

**233. Attachments** None

**234. Other** None

**235. Total** 110,000.00

**236. Signature** Guy T. Helvering

**237. Date** May 1, 1935

**238. Preparer** None

**239. Remarks** None

**240. Notes** None

**241. Attachments** None

**242. Other** None

**243. Total** 110,000.00

**244. Signature** Guy T. Helvering

**245. Date** May 1, 1935

**246. Preparer** None

**247. Remarks** None

**248. Notes** None

**249. Attachments** None

**250. Other** None

**251. Total** 110,000.00

**252. Signature** Guy T. Helvering

**253. Date** May 1, 1935

**254. Preparer** None

**255. Remarks** None

**256. Notes** None

**257. Attachments** None

**258. Other** None

**259. Total** 110,000.00

**260. Signature** Guy T. Helvering

**261. Date** May 1, 1935

**262. Preparer** None

**263. Remarks** None

**264. Notes** None

**265. Attachments** None

**266. Other** None

**267. Total** 110,000.00

**268. Signature** Guy T. Helvering

**269. Date** May 1, 1935

**270. Preparer** None

**271. Remarks** None

**272. Notes** None

**273. Attachments** None

**274. Other** None

**275. Total** 110,000.00

**276. Signature** Guy T. Helvering

**277. Date** May 1, 1935

**278. Preparer** None

**279. Remarks** None

**280. Notes** None

**281. Attachments** None

**282. Other** None

**283. Total** 110,000.00

**284. Signature** Guy T. Helvering

**285. Date** May 1, 1935

**286. Preparer** None

**287. Remarks** None

**288. Notes** None

**289. Attachments** None

**290. Other** None

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**295. Remarks** None

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**301. Date** May 1, 1935

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**305. Attachments** None

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**450. Other** None

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**501. Date** May 1, 1935

**502. Preparer** None

**503. Remarks** None

**504. Notes** None

**505. Attachments** None

**506. Other** None

**507. Total** 110,000.00

**508. Signature** Guy T. Helvering

**509. Date** May 1, 1935

**510. Preparer** None

**511. Remarks** None

**51**

[illegible]



47

47

*Bill to Income*

**BOETTCHER & COMPANY, INCORPORATED**  
INVESTMENT BANKERS  
878 SEVENTEENTH STREET  
DENVER, COLORADO

August 4, 1927

Collector of Internal Revenue  
Denver  
Colorado

Dear Sir:

Enclosed please find amended returns for the tax year 1926 of James Q. Newton, Trustee, and James Q. Newton, Jr., together with checks covering the first two quarterly payments of the additional tax for both accounts.

Please consider these funds as having been paid under protest.

The additional tax is due to the ruling of your Department that the reorganization of the Colorado Fuel & Iron Company was profitable to the holders of that company's securities. This means that, without disposing of any securities, we have a tax imposed upon us, which, in turn, means a capital tax. I am sure our Congress does not intend to levy capital taxes at this time.

Please advise what steps I may take to further my position of protest.

Very truly yours

*James Q. Newton*

*mailed  
9299.63  
Jan 15/28  
May 20/28  
20*

*262996607  
192703*

*Exhibit A to Petition*

TREASURY DEPARTMENT,  
Washington, December 3, 1938.

JAMES Q. NEWTON TRUST,  
828 17th Street, Denver, Colorado.

DEAR SIR: You are advised that the determination of your income tax liability for the taxable year ended December 31, 1936, discloses a deficiency of \$12,325.60 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: C1: P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner,

By (s) BERT E. HELVERN,  
Internal Revenue Agent in Charge.

Enclosures:

Statement.

Form of Waiver. 870.

50

## STATEMENT

IT: CL: P-7.  
(FLD-90D).

JAMES Q. NEWTON TRUST

828 17th Street, Denver, Colorado

Tax Liability for the Taxable Year Ended December 31, 1936

|                 | Liability     | Assessed      | Deficiency    |
|-----------------|---------------|---------------|---------------|
| Income Tax..... | \$51, 619. 30 | \$39, 293. 70 | \$12, 325. 60 |

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated October 25, 1938.

### Adjustments to Net Income

|  |              |
|--|--------------|
| Net Income as disclosed by Amended Return..... | \$100,538.23 |
| Unallowable deductions and additional income:  |              |
| (a) Fiduciary income increased.....            | 19,880.00    |
| Net income adjusted.....                       | 129,418.23   |

(a) The additional income is the share of your trust to the additional income of the entire trust before allocation of the beneficial interests. See Exhibit B.

The additional income of the Trust is as follows:

|   |             |
|---|-------------|
| Net Income as per Fiduciary Income Tax Return.....          | \$93,761.41 |
| Unallowable deductions and additional income:               |             |
| (a) Additional Capital Gains.....                           | 79,709.75   |
| (b) U. S. Income Tax deficiency for 1934, paid in 1936..... | 1,520.22    |
| Net income adjusted.....                                    | 174,991.38  |

### Explanation of Adjustments

|                                   |             |
|-----------------------------------|-------------|
| (a) Capital Gains, increased..... | \$79,709.75 |
|-----------------------------------|-------------|

Your trust held \$152,000.00 par value bonds of the Colorado Industrial Company's 5% 30-year Gold Bonds which were guaranteed by the Colorado Fuel & Iron Company.

The latter company reorganized under the name of Colorado Fuel & Iron Corporation, and exchanged its own bonds and stock (common) September 1, 1936, for the Colorado Industrial Company bonds.

51 The basis for this exchange was \$400.00 par bonds and 20 shares of stock of the new company for each \$1,000.00 par bonds of the Colorado Industrial Company.

For its \$152,000.00 par bonds of the Colorado Industrial Company, your trust received in exchange therefor \$60,800.00 par value bonds and 3,040 shares of common stock of the new Colorado Fuel & Iron Corporation.

This was a taxable exchange, although not so considered by the trust, and the Bureau held in letter addressed to this office, dated January 14, 1939, symbols: IT:EV:Se-PWL, the market value of the new securities on September 1, 1936 was determined to be as follows:

|            |         |
|------------|---------|
| Bonds..... | \$85.25 |
| Stock..... | 32.25   |

Following the decision of the Bureau as to the taxability of the exchange, the trust did not file an amended fiduciary return for 1936 but did file an amended return on form 1040, using the following values in the computation of the gain from the exchange:

|       |         |
|-------|---------|
| Bonds | \$79.00 |
| Stock | 20.50   |

The deficiency resulting from this adjustment was paid under protest and the trust intends to protest the present adjustment also, the chief basis for protest being the contention that the C. F. & I. marked up its assets prior to the reorganization some \$13,000,000.00 and six months after the reorganization wrote their assets down by practically the same amount, hence the valuation for the new securities was not properly reflected in the Bureau's valuation, nor by the market quotations immediately following the reorganization, since any sales of consequence following the reorganization would have caused the market quotation to drop to a figure more in keeping with the true value of the securities in question.

For complete details of the computations involved in the exchange, see Exhibit A, this statement.

(b) U. S. Income Tax deficiency for 1934 paid in 1936 is an unallowable deduction for income tax purposes as per Section 23 (c) (1) of the Revenue Act of 1936.

52

## Computation of Tax

## Taxable year 1936

|  |              |
|--|--------------|
| Net income adjusted  | \$129,418.23 |
| Less: Personal exemption   | 1,000.00     |
| Balance (surtax net income)  | 128,418.23   |
| Net income subject to Normal Tax                                     | 128,418.23   |
| Normal tax 4% on \$128,418.23  | 5,136.73     |
| Surtax on \$124,418.23 <sup>1</sup> (Amount in excess of \$4,000.00) | 40,482.57    |
| Total tax  | 51,619.30    |
| Correct income tax liability   | 51,619.30    |
| Income Tax assessed:   |              |
| Original, Acct. No. 203007   | \$9,290.63   |
| Additional, Acct. No. 204001   | 29,994.07    |
|  | 39,284.70    |
| Deficiency of Income Tax   | 12,325.60    |

<sup>1</sup> Error in computation of Surtax in R. A. R. and 30-day letter, \$100.00, corrected herein.



53

## Exhibit A

## C. I. C. Bonds Exchanged for C. F. &amp; I. Stock and Bonds, 9-1-36

| Purchased | C. I. C.<br>(par.) | Cost      | Exchanged | C. F. & I.     |                   |
|-----------|--------------------|-----------|-----------|----------------|-------------------|
|           |                    |           |           | Bonds<br>(par) | Stock<br>(shares) |
| 3-14-35   | 10,000.00          | 2,537.50  | for       | 4,000.00       | 200               |
| 4-8-35    | 10,000.00          | 2,273.75  | "         | 4,000.00       | 200               |
| 4-24-35   | 15,000.00          | 3,456.25  | "         | 6,000.00       | 300               |
| 6-12-35   | 15,000.00          | 3,802.50  | "         | 6,000.00       | 300               |
| Group I   | 50,000.00          | 12,070.00 |           | 20,000.00      | 1,000             |
| 9-18-35   | 5,000.00           | 1,575.30  | for       | 2,000.00       | 100               |
| 9-19-35   | 10,000.00          | 3,071.25  | "         | 4,000.00       | 200               |
| 10-1-35   | 10,000.00          | 3,097.50  | "         | 4,000.00       | 200               |
| 10-3-35   | 5,000.00           | 1,462.50  | "         | 2,000.00       | 100               |
| 10-25-35  | 22,000.00          | 7,114.50  | "         | 8,800.00       | 440               |
| 4-2-36    | 50,000.00          | 34,325.00 | "         | 20,000.00      | 1,000             |
| Group II  | 102,000.00         | 50,645.25 |           | 40,800.00      | 2,040             |
| Total     | 152,000.00         | 62,715.25 |           | 60,800.00      | 3,040             |

| Corrected           |            |
|---------------------|------------|
| Group I:            |            |
| 200 Bonds @ \$55.25 | 11,050.00  |
| 1,000 Stock @ 22.25 | 22,200.00  |
| Value of New        | 48,300.00  |
| Group II:           |            |
| 408 Bonds @ \$65.25 | 26,782.00  |
| 2,040 Stock @ 22.25 | 65,790.00  |
| Value of New        | 100,572.00 |

| Used Amended #1040  |           |
|---------------------|-----------|
| Group I:            |           |
| 200 Bonds @ \$79.00 | 15,800.00 |
| 1,000 Stock @ 26.50 | 26,500.00 |
| Value of New        | 42,300.00 |
| Group II:           |           |
| 408 Bonds @ \$79.00 | 32,232.00 |
| 2,040 Stock @ 26.50 | 54,060.00 |
| Value of New        | 86,292.00 |

| 54             | Value new        | Cost old  | Gain      |                        | Value new        | Cost old  | Gain      |
|----------------|------------------|-----------|-----------|------------------------|------------------|-----------|-----------|
| I              | 48,300.00        | 12,070.00 | 37,230.00 | I                      | 42,300.00        | 12,070.00 | 30,230.00 |
| II             | 100,572.00       | 50,645.25 | 49,926.75 | II                     | 86,292.00        | 50,645.25 | 35,646.75 |
|                | 148,872.00       | 62,715.25 | 87,156.75 |                        | 128,592.00       | 62,715.25 | 65,876.75 |
| I              | 37,230.00 @ 80%  |           | 29,784.00 | I                      | 30,230.00 @ 80%  |           | 24,184.00 |
| II             | 49,926.75 @ 100% |           | 49,926.75 | II                     | 35,646.75 @ 100% |           | 35,646.75 |
| Taxable Gain   |                  |           | 79,709.75 | Reported Amended #1040 |                  |           | 80,829.75 |
| Reported #1041 |                  |           |           | Corrected              |                  |           | 79,709.75 |
| Additional     |                  |           | 79,709.75 | Additional             |                  |           | 19,980.00 |

| 55  | Ratio | Total      | Capital gains | First provision | Balance ordinary net income | 2% tax paid at source |
|---|-------|------------|---------------|-----------------|-----------------------------|-----------------------|
| (1) Trust, Form 1040, Denver, Colo.                   |       | 120,418.23 | 120,418.23    |                 |                             |                       |
| (2) Mr. Nello S. Newton, 801 York St., Denver, Colo.  | 1/4   | 23,983.22  |               | 3,000.00        | 20,983.22                   | 2.35                  |
| (3) James Q. Newton, Jr., 801 York St., Denver, Colo. | 1/4   | 7,196.65   |               | 3,600.00        | 4,196.65                    | .78                   |
| (4) Nancy Newton Davis, 75 Cherry St., Denver, Colo.  | 1/4   | 7,196.64   |               | 3,000.00        | 4,196.64                    | .78                   |
| (5) Ruth Newton Pierce, 230 North St., Buffalo, N. Y. | 1/4   | 7,196.64   |               | 3,000.00        | 4,196.64                    | .77                   |
|   |       | 174,991.38 | 120,418.23    | 12,000.00       | 33,573.15                   | 4.69                  |

*Statement of points*

Filed Jan. 8, 1941

Comes now the petitioner on review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to wit:

The United States Board of Tax Appeals erred—

1. In ordering and deciding that there is an overpayment in income tax for the year 1936 in the amount of \$29,994.07.

2. In failing to sustain the deficiency determined by the Commissioner, less a proper reduction of said deficiency to reflect the adjustments agreed upon by the parties at the hearing before the United States Board of Tax Appeals.

3. In holding and deciding that the reorganization under Section 77B of the Bankruptcy Act constituted a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 12 (g) (1) (C).

4. In failing to hold and decide that the reorganization under Section 77B of the Bankruptcy Act did not constitute a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

5. In holding that there was a continuity of interest of the transferors in the transferee within the scope and meaning of Section 112 (g) (1) (C) of the Revenue Act of 1936.

6. In holding and deciding that the gain resulting to the taxpayer from the exchange was not recognizable under Section 112 (b) (3).

7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

(Signed) J. P. WENCHEL,

C. A. R.

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

Statement of Service

A copy of this Statement of Points was mailed to attorneys for respondent on review this date, January 8, 1941.

(Signed) J. P. WENCHEL,  
C. A. R.  
J. P. Wenchel,  
Chief Counsel,  
Bureau of Internal Revenue.

[File endorsement omitted.]

187 Before United States Board of Tax Appeals

*Designation of portions of record to be contained in record on review*

Filed Jan. 8, 1941

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Tenth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
  - (a) Petition, including annexed copy of deficiency letter and statement attached thereto.
  - (b) Answer.
3. Findings of fact and opinion promulgated August 6, 1940.
4. Decision entered September 6, 1940.
5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
6. Stipulation of facts, including exhibits.
7. Statement of Points.
8. Any and all orders of enlargement of time for the preparation, transmission and delivery of the record, not included in record.
9. This designation of portions of record to be contained in record on review.

(Signed) J. P. WENCHEL,  
C. A. R.  
J. P. Wenchel,  
Chief Counsel,  
Bureau of Internal Revenue.

## Statement of Service

188 A copy of this designation of portions of record to be contained in record on review was mailed to attorneys for respondent on review this date, January 8, 1941.

J. P. WENCHEL,

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

[File endorsement omitted.]

Before United States Board of Tax Appeals

*Order enlarging time*

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation and transmission of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Tenth Circuit, be and it is hereby extended to Feb. 24, 1941:

CHARLES P. SMITH,

Member.

Dated, Washington, D. C., Dec. 21, 1940.

jd.

Now, Feb. 7, 1941, the foregoing is certified from the record as a true copy.

B. D. GAMBLE,

Clerk,

U. S. Board of Tax Appeals.

*Certificate*

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 185, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

189 In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of February, 1941.

[SEAL]

B. D. GAMBLE,

Clerk,

United States Board of Tax Appeals.



190 In the United States Circuit Court of Appeals for  
the Tenth Circuit*Motion for consolidation, etc.*

Filed Feb. 21, 1941

Now comes the Commissioner of Internal Revenue, by his attorney, Samuel O. Clark, Jr., Assistant Attorney General, and shows to the Court that the above-entitled causes, being Board of Tax Appeals Docket Numbers 97325 and 97324, respectively, were consolidated for hearing and decision in the Board of Tax Appeals; that, under date of August 6, 1940, the Board of Tax Appeals promulgated one opinion in the two proceedings; that the two proceedings in this Court involve substantially identical facts and the issues of law therein are the same; that, while separate records are being printed in the two cases due to separate stipulations of facts before the Board, there has been designated for printing only in the Newton Trust case exhibits "A" to "N," inclusive, attached to the stipulation therein; that these exhibits are common to the two cases and were so considered by the Board of Tax Appeals in its decision.

191 Wherefore, counsel for the Commissioner of Internal Revenue moves the Court that the two above entitled causes be consolidated for purposes of briefing and argument in this Court and that the exhibits "A" to "N," inclusive, designated for printing in the Newton Trust case, be taken and considered for all purposes as forming a part of the printed record in the case of Commissioner v. James Q. Newton, Jr.

SAMUEL O. CLARK, JR.,  
Assistant Attorney General.

[File endorsement omitted.]

In United States Circuit Court of Appeals

*Order granting motion for consolidation*

April 7, 1941

These causes came on to be heard on the motion of petitioner for the consolidation of the causes for the purpose of oral argument and were submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that these causes be and the same are hereby consolidated for the purpose of oral argument.

*Order of submission*

Thirty-sixth Day, April Term, Wednesday, June 25th, A. D. 1941. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, Arthur A. Armstrong, Esquire, appearing for petitioner, Richard Davis, Esquire, appearing for respondent.

On motions, petitioner was granted leave to file a reply brief herein within ten days from this day and respondent was granted leave to file an answer thereto within ten days thereafter.

Thereupon this cause was submitted to the court.

Nos. 2267 and 2268—April Term, 1941.

Arthur A. Armstrong, Sp. Asst. to the Atty. Gen. (Samuel O. Clark, Jr., Asst. Atty. Gen., and Sewall Key and Samuel H. Levy, Sp. Assts. to the Atty. Gen., were with him on the brief) for petitioner.

Richard M. Davis (Quigg Newton, Jr., and Newton, Davis and Drinkwater were with him on the brief) for respondent.

Before PHILLIPS, HUXMAN, and MURRAH, Circuit Judges.

*Opinion*

July 24, 1941

PHILLIPS, Circuit Judge, delivered the opinion of the court.

The ultimate questions here presented are identical with those considered by the court in Number 2270—*Commissioner of Internal Revenue v. Cement Investors, Inc.*, this day decided, the facts being substantially the same, except as to the amount of bonds involved and the cost thereof to the respective taxpayers.

Therefore, on authority of *Commissioner of Internal Revenue v. Cement Investors, Inc.*, the orders of the Board of Tax Appeals are respectively affirmed.

*Judgment*

Forty-eighth Day, April Term, Thursday, July 24th, A. D. 1941. Before Honorable Orie L. Phillips, Circuit Judge, and Honorable J. Foster Symes, District Judge.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said United States Board of Tax Appeals be and the same is hereby affirmed.

On August 30, 1941, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States Board of Tax Appeals.

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*Clerk's certificate*

United States Circuit Court of Appeals, Tenth Circuit

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the transcript of the record from the United States Board of Tax Appeals, and full, true and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2268, wherein Commissioner of Internal Revenue was petitioner and James Q. Newton Trust was respondent, as full, true and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 9th day of September, A. D. 1941..

[SEAL]

ROBERT B. CARTWRIGHT,  
*Clerk of the United States Circuit  
 Court of Appeals, Tenth Circuit,*  
 By GEORGE A. PEASE,  
*Deputy Clerk.*

No. 645, October Term, 1941

*Order allowing certiorari*

March 9, 1942

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

197 In the Supreme Court of the United States

*Stipulation*

Filed March 24, 1942

It is hereby stipulated by and between the parties hereto that Exhibits D through N, both inclusive, of the record need not be reprinted since these exhibits are identical with the corresponding exhibits in *Helvering v. Cement Investors, Inc.*, No. 644, which will be heard immediately preceeding the instant cause.

CHARLES FAHY,  
*Solicitor General of the United States,*  
*Counsel for the Petitioner.*

RICHARD M. DAVIS,  
*Counsel for the Respondent.*

MARCH —, 1942.





# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 646

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

VS.

JAMES Q. NEWTON, JR.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT

---

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1941  
CERTIORARI GRANTED MARCH 9, 1942

**UNITED STATES CIRCUIT COURT OF APPEALS  
TENTH CIRCUIT**

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**No. 2267**

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**COMMISSIONER OF INTERNAL REVENUE, PETITIONER,**  
**VS.**  
**JAMES Q. NEWTON, JR., RESPONDENT.**

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**[Petitioner's Designation of Record.]**

**Robert B. Cartwright, Clerk,  
U. S. Circuit Court of Appeals  
for the Tenth Circuit,  
Denver Colorado.**

**Sir:**

Further reference is made to your letters of February 11, 1941, acknowledging receipt of transcript of record in the above entitled proceedings upon petitions for review by the Commissioner of Internal Revenue, and to our telegram of February 17, 1941, designating the portion of the records in the two cases for printing.

\* \* \* \* \*

Also, that in Commissioner v. James Q. Newton, Jr., No. 2267, a separate record be printed and that the transcript of record as filed be printed including the stipulation of facts but excluding the exhibits.

**Respectfully**

**For the Attorney General,  
SAMUEL O. CLARK, JR.,  
Assistant Attorney General.**

**Filed February 19, 1941, Robert B. Cartwright, Clerk.**

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## UNITED STATES BOARD OF TAX APPEALS.

JAMES Q. NEWTON, JR., PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket. No. 97325.

Appearances—For Petitioner: Richard M. Davis, Esq., Quigg Newton Jr., Esq., For Respondent: A. R. Shannon, Jr., Esq., Carroll Walker, Esq.

## Docket Entries:

1939

Mar. 2—Petition received and filed. Taxpayer notified. (Fee paid.)

Mar. 2—Copy of petition served on General Counsel.

Apr. 18—Answer filed by General Counsel.

Apr. 18—Request for Circuit hearing in Denver, Colorado, filed by General Counsel.

Apr. 26—Notice issued placing proceeding on Denver, Colorado Calendar. Answer and request served.

July 28—Hearing set September 18, 1939, in Denver, Colorado.

Sept. 21—Hearing had before Miss Harron on merits. Stipulation of facts filed. Consolidated for hearing with docket 97324. Petitioner's brief due 11/6/39—respondent's brief due 12/6/39—reply due 12/21/39.

Oct. 9—Transcript of hearing Sept. 21, 1939 filed.

Nov. 6—Brief filed by taxpayer. 11/6/39 copy served.

Nov. 27—Motion for extension to Jan. 6, 1940 to file brief filed by General Counsel. 11/28/39 granted and petitioner's reply due Feb. 6, 1940.

1940

Jan. 5—Motion for extension to 1/22/40 to file brief filed by General Counsel. 1/6/40 granted—petitioner's reply due February 21, 1940.

Jan. 24—Motion for leave to file attached brief filed by General Counsel. 1/25/40 granted.

Feb. 5—Motion for extension to March 25, 1940 to file reply brief filed by taxpayer.

- Mar. 11—Motion for leave to file the attached reply brief filed by taxpayer—reply brief lodged. 3/11/40 granted.
- Mar. 12—Copy of motion and reply brief served on General Counsel.
- Aug. 6—Findings of fact and opinion rendered—Miss Harron, Division 13. Decision will be entered under Rule 50.
- Sept. 4—Agreed computation of deficiency filed.
- Sept. 6—Decision entered—Miss Harron, Division 13.
- Nov. 26—Petition for review by U. S. Circuit Court of Appeals, Tenth Circuit, with assignments of error filed by General Counsel.
- Dec. 2—Proof of service filed. (Counsel.)
- Dec. 5—Proof of service filed by General Counsel. (Taxpayer.)
- Dec. 21—Motion for extension to 2/24/41 to complete and transmit record filed by General Counsel.
- Dec. 21—Order enlarging time to 2/24/41 to prepare and transmit the record entered.
- 1941
- Jan. 8—Statement of points filed by General Counsel with affidavit of service thereon.
- Jan. 8—Designation of portions of record to be contained in review record filed by General Counsel with affidavit of service thereon.
- Jan. 18—Proof of service of filing statement of points filed by General Counsel.
- Jan. 18—Proof of service of filing designation of record filed by General Counsel.

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### Petition.

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in notice of deficiency, IT:CL:P-7 (FLD-90D), dated December 3, 1938 and for a finding and determination by the Board of an overpayment by petitioner of his income tax for the calendar year 1936 in the amount of \$269.59 so that when the decision of the Board has become final, such overpayment, together with interest of such other sum as may be recoverable by law, shall be credited or refunded to Petitioner.

As a basis of his proceeding, Petitioner alleges, as follows:

1. The petitioner now is an individual with his office at 215 Colorado National Bank Building, Denver, Colorado. The returns for the period here involved were filed with the Collector of Internal Revenue for the District of Colorado at Denver, Colorado.

2. The notice of deficiency, a copy of which is attached hereto and marked "Exhibit A", was mailed to Petitioner on December 3, 1938.

3. The tax in controversy consists of income tax imposed for the calendar year 1936. The Respondent, by said notice of deficiency, has determined a deficiency of \$690.84, which together with the said overpayment of \$269.59, is the total amount in controversy.

4. The determination of the deficiency is based upon the following errors:

A. The holding of the Respondent that the market value of \$4,000.00 face value at 5% Income Mortgage Bonds and 200 shares of capital stock of The Colorado Fuel and Iron Corporation, on September 1, 1936, was \$85.25 and \$32.25, respectively.

B. The holding of the Respondent that the surrender by Petitioner of \$10,000.00 face value of Colorado Industrial Company 5% Bonds in exchange for \$4,000.00 face value of 5% Income Mortgage Bonds and 200 shares of capital stock of The Colorado Fuel and Iron Corporation constituted a taxable exchange.

C. The holding of the Respondent that the surrender by the James Q. Newton Trust of \$152,000.00 face value of Colorado Industrial Company 5% Bonds in exchange for \$60,800.00 face value of 5% Income Mortgage Bonds and 3,040 shares of capital stock of The Colorado Fuel and Iron Corporation constituted a taxable exchange to said James Q. Newton Trust and increasing the amount of Petitioner's beneficial interest therein.

5. The facts upon which the Petitioner relies as the basis of this proceeding, are as follows:



**A. First Assignment of Error:**

The fair market value of \$4,000.00 face value of 5% Income Mortgage Bonds and 200 shares of capital stock of The Colorado Fuel and Iron Corporation, on September 1, 1936, was \$79.00 and \$26.50, respectively.

**B. Second Assignment of Error.**

On March 1, 1935 there was filed in the District Court of the United States, for the District of Colorado, In the Matter of The Colorado Fuel and Iron Company and Another, Debtors, Consolidated Cause No. 8081, a Plan of Reorganization. At that time the Colorado Fuel and Iron Company had outstanding its own General Mortgage 5% Bonds, preferred stock and common stock, and it was also the guarantor on the First Mortgage 5% Bonds of the Colorado Industrial Company, a subsidiary corporation.

On April 25, 1936 the Court approved the Plan of Reorganization, which provided that a new company should be organized with an authorized capital of 1,000,000 shares of stock and \$11,053,200.00 5% Income Mortgage Bonds. The new company was to assume the payment of the General Mortgage 5% Bonds of the Colorado Fuel and Iron Company, which were not disturbed; was to issue \$11,053,200.00 of its Income Mortgage Bonds and 552,660 shares of its stock, in exchange for the First Mortgage 5% Bonds of The Colorado Industrial Company, in the ratio of \$400.00 face value of new bonds and 20 shares of stock for each \$1,000.00 face amount of Colorado Industrial Company bonds, and was to issue to preferred and common stockholders of the Colorado Fuel and Iron Company warrants to purchase certain specified amounts of stock of the new company at \$35.00 per share on or before February 1, 1950; 315,379 shares of stock of the new company being reserved for this purpose.

In pursuance of the Plan of Reorganization, The Colorado Fuel and Iron Corporation was organized under the laws of the State of Colorado, and on June 20, 1936 the Court directed the Colorado Fuel and Iron Company, the Colorado Industrial Company, Arthur Roeder, Trustee, and The New York Trust Company, as Trustee under the

Colorado Industrial Company Mortgages securing its First Mortgage 5% Bonds, to convey to The Colorado Fuel and Iron Corporation all of their right, title and interest in all of the assets of the Colorado Fuel and Iron Company and the Colorado Industrial Company. Simultaneously therewith, The Colorado Fuel and Iron Corporation was directed to deliver to, or on the order of, the Reorganization Managers \$11,053,200.00 of its Income Bonds, 552,660 shares of its stock and warrants representing the right to purchase 315,379 shares of its stock. This order further provides that upon the surrender of the outstanding bonds of Colorado Industrial Company to the Reorganization Managers, they should distribute to the holders thereof the Income Mortgage Bonds and capital stock of The Colorado Fuel and Iron Corporation to which they were entitled, respectively, under the Plan. And The New York Trust Company, Trustee, was directed to execute and deliver to The Colorado Fuel and Iron Corporation a satisfaction and discharge of the First Mortgage of the Colorado Industrial Company.

On July 1, 1936 the Plan of Reorganization was consummated in accordance with the foregoing order, and thereafter the Petitioner surrendered his \$10,000.00 face amount of Colorado Industrial Company First Mortgage 5% Bonds in exchange for \$4,000.00 face amount of the Income Mortgage Bonds and 200 shares of the stock of The Colorado Fuel and Iron Corporation.

At no time no shares of stock of The Colorado Fuel and Iron Corporation, other than the above-mentioned 552,660 shares of stock to be issued to the holders of Colorado Industrial Company First Mortgage 5% Bonds, were issued, so that immediately after the exchange, the holders of said Colorado Industrial Company bonds were in control of The Colorado Fuel and Iron Corporation.

#### C. Refund of Overpayment:

On August 4, 1937 Petitioner paid to the Respondent additional income taxes for the calendar year 1936 amounting to \$269.59 on account of the surrender by Petitioner of \$10,000.00 face value of Colorado Industrial Company 5% Bonds in exchange for \$4,000.00 face value of 5% Income Mortgage Bonds and 200 shares of capital stock of The Colorado Fuel and Iron Corporation.

Wherefore, Petitioner prays that this Board may hear this proceeding and determine that there is no deficiency in Petitioner's income tax for the calendar year 1936 and find and determine that the Petitioner overpaid his income tax for the calendar year 1936 in the amount of \$269.50 so that when the decision of this Board has become final, such payment, together with interest or such other sum as may be recoverable by law, shall be credited to refunded to Petitioner.

JAMES Q. NEWTON, JR.,  
Colorado National Bank Building,  
Denver, Colorado,

Petitioner.

[Verification omitted.]

Filed March 2, 1939, U. S. Board of Tax Appeals.

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Exhibit A.

Treasury Department.  
Washington.

December 3, 1938.

Mr. James Q. Newton, Jr.,  
828—17th Street,  
Denver, Colorado.

Dear Sir:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1936 discloses a deficiency of \$690.84 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite

the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner,

Enclosures:  
Statement.  
Form of waiver. 870

By (s) BERT E. HELVERN,  
Internal Revenue Agent  
in Charge.

Statement.

IT:CL:P-7  
(FLD-90D)

Mr. James Q. Newton, Jr.  
828—17th Street  
Denver, Colorado

**Tax Liability for the Taxable Year Ended December 31, 1936**

|            | Liability  | Assessed   | Deficiency |
|------------|------------|------------|------------|
| Income Tax | \$2,572.53 | \$1,881.69 | \$690.84   |

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated October 25, 1938.

**Adjustments to Net Income.**

Net income as disclosed by amended Return \$20,021.72

**Unallowable deductions and additional income:**

|                                 |          |          |
|---------------------------------|----------|----------|
| (a) Loss of Partnership reduced | 2,360.20 |          |
| (b) Fiduciary income increased  | 190.02   |          |
| (c) Capital Gain increased      | 1,120.00 | 3,670.22 |

Net income adjusted 23,691.94

**Explanation of Adjustments.**

(a) Loss claimed from Partnership of Boettcher-Newton & Co. Partnership, New York, N. Y., \$3,244.72, is reduced to a loss of \$884.52 as a result of the Revenue Agent's examination of the Partnership in New York as disclosed by letter of the

Internal Revenue Agent in Charge, 2nd New York District,  
dated May 17, 1938. Loss Reduced, \$2,360.20.

(b) Fiduciary income increased, \$190.02.

Your beneficial interest in the James Q. Newton Trust has  
been increased by \$190.02 as follows:

|  |           |
|--|-----------|
| Net income as per Fiduciary Income Tax Return            | 93,761.41 |
| (1) Additional Capital Gain                              | 79,709.75 |
| (2) U. S. Income Tax deficiency for 1934 paid<br>in 1936 | 1,520.22  |

|                     |            |
|---------------------|------------|
| Net income adjusted | 174,991.38 |
|---------------------|------------|

(1) Your trust held \$152,000.00 par value bonds of the  
Colorado Industrial Company's 5% 30-year Gold Bonds  
which were guaranteed by the Colorado Fuel & Iron Company.

The latter company reorganized under the name of Colorado  
Fuel & Iron Corporation, and exchanged its own bonds and  
stock (common) September 1, 1936 for the Colorado Industrial  
Company bonds.

The basis for this exchange was \$400.00 par bonds and 20  
shares of stock of the new company for each \$1,000.00 par  
bonds of the Colorado Industrial Company.

For its \$152,000.00 par bonds of the Colorado Industrial  
Company, your trust received in exchange therefor \$60,800.00  
par value bonds and 3,040 shares of common stock of the new  
Colorado Fuel & Iron Corporation.

This was a taxable exchange, although not so considered by  
the trust, and the Bureau held in letter addressed to this office,  
dated January 14, 1938, symbols: IT:EV:Se:PWL, the market  
value of the new securities on September 1, 1936 was deter-  
mined to be as follows:

|       |         |
|-------|---------|
| Bonds | \$85.25 |
| Stock | 32.25   |

Following the decision of the Bureau as to the taxability of the  
exchange, the trust did not file an amended fiduciary return for  
1936 but did file an amended return on form 1040, using the  
following values in the computation of the gain from the ex-  
change:

|       |         |
|-------|---------|
| Bonds | \$79.00 |
| Stock | 26.50   |



The deficiency resulting from this adjustment was paid under protest and the trust intends to protest the present adjustment also, the chief basis for protest being the contention that the C. F. & I. marked up its assets prior to the reorganization some \$13,000,000.00 and six months after the reorganization wrote their assets down by practically the same amount, hence the valuation for the new securities was not properly reflected in the Bureau's valuations, nor by the market quotations immediately following the reorganization, since any sales of consequence following the reorganization would have caused the market quotation to drop to a figure more in keeping with the true value of the securities in question.

For complete details of the computations involved in the exchange, see Exhibit A this report.

(2) U. S. Income Tax deficiency for 1934 paid in 1936 is an unallowable charge as expense as per Sec. 23 (c) (1) of the Revenue Act of 1936.

(a) Capital gains increased \$1,120.00. You held 10 M par bonds of the Colorado Industrial Company, purchased 8-22-35 at a cost of \$2,800.00. On September 1, 1936 these bonds were exchanged for 4 M par bonds and 200 shares of stock of the Colorado Fuel & Iron Corporation as the result of a reorganization. You did not consider this a taxable transaction and reported no gain or loss from the exchange.

The Bureau subsequently held the exchange to be taxable and determined the value of the new bonds and stock to have had a value as of September 1, 1936, date of exchange, as follows:

|       |         |
|-------|---------|
| Bonds | \$85.25 |
| Stock | 32.25   |

Pursuant to the Bureau's decision as to the taxability of the exchange, you filed an amended return and reported a taxable gain from the exchange of \$4,528.00, computed as follows:

|                                     |          |            |
|-------------------------------------|----------|------------|
| 40 Bonds @ 79.00                    | 3,160.00 |            |
| 200 Stock @ 26.50                   | 5,300.00 |            |
|                                     |          | <hr/>      |
| Value of new securities             | 8,460.00 |            |
| Value of new securities, bro't fwd. |          | \$8,460.00 |
| Cost of old                         |          | 2,800.00   |
|                                     |          | <hr/>      |
| Gain                                |          | 5,660.00   |
| 80% Taxable, \$4,528.00             |          |            |

The correct taxable gain from the exchange is \$5,648.00, or a difference of \$1,120.00, computed as follows:

|                              |          |
|------------------------------|----------|
| 40 Bonds @ 85.25             | 3,410.00 |
| 200 Stock @ 32.25            | 6,450.00 |
|                              | <hr/>    |
| Correct value new securities | 9,860.00 |
| Cost old securities          | 2,800.00 |
|                              | <hr/>    |
| Correct Gain                 | 7,060.00 |
| 80% taxable \$5,648.00       |          |
| Summary.                     |          |
| Taxable Gain corrected       | 5,648.00 |
| Taxable Gain reported        | 4,528.00 |
|                              | <hr/>    |
| Additional Gain              | 1,120.00 |

## Computation of Tax.

Year 1936

|  |             |
|--|-------------|
| Net income adjusted                                    | \$23,691.94 |
| Less: Personal exemption                               | 1,000.00    |
|  | <hr/>       |
| Balance (Surtax Net Income)                            | 22,691.94   |
| Less: Earned Income Credit (Statutory)                 | 300.00      |
|  | <hr/>       |
| Net income subject to normal tax                       | 22,391.94   |
| Normal Tax at 4% on \$22,391.94                        | 895.68      |
| Surtax on \$18,691.94 (Amount in excess of \$4,000.00) | 1,677.63    |
|  | <hr/>       |
| Total Tax  | 2,573.31    |
| Less: Income tax paid at the source                    | .78         |
|  | <hr/>       |
| Corrected income tax liability                         | 2,572.53    |
| Income tax assessed: Original, Acct.                   |             |
| No. 203006   | 1,620.27    |
| Additional, Acct.                                      |             |
| No. 204002   | 261.42      |
|  | <hr/>       |
| Total assessed   | 1,881.69    |
|  | <hr/>       |
| Deficiency of income tax                               | 690.84      |

## Exhibit A.

C. I. C. Bonds Exchanged for C. F. & I.  
Stocks and Bonds, 9-1-36.

C. I. C.

C. F. &amp; I.

| Purchased | Par        | Cost      | Exchanged | Bonds<br>(Par) | Stock<br>(Shares) |
|-----------|------------|-----------|-----------|----------------|-------------------|
| 3-14-35   | 10,000.00  | 2,537.50  | for       | 4,000.00       | 200               |
| 4-5-35    | 10,000.00  | 2,273.75  | "         | 4,000.00       | 200               |
| 4-24-35   | 15,000.00  | 3,456.25  | "         | 6,000.00       | 300               |
| 6-12-35   | 15,000.00  | 3,802.50  | "         | 6,000.00       | 300               |
| <hr/>     |            |           |           |                |                   |
| Group I   | 50,000.00  | 12,070.00 |           | 20,000.00      | 1,000             |
| <hr/>     |            |           |           |                |                   |
| 9-18-35   | 5,000.00   | 1,575.50  | for       | 2,000.00       | 100               |
| 9-19-35   | 10,000.00  | 3,071.25  | "         | 4,000.00       | 200               |
| 10-1-35   | 10,000.00  | 3,097.50  | "         | 4,000.00       | 200               |
| 10-2-35   | 5,000.00   | 1,462.50  | "         | 2,000.00       | 100               |
| 10-25-35  | 22,000.00  | 7,114.50  | "         | 8,800.00       | 440               |
| 4-2-36    | 50,000.00  | 34,325.00 | "         | 20,000.00      | 1,000.00          |
| <hr/>     |            |           |           |                |                   |
| Group II  | 102,000.00 | 50,646.25 |           | 40,800.00      | 2,040             |
| <hr/>     |            |           |           |                |                   |
| Total     | 152,000.00 | 62,716.25 |           | 60,800.00      | 3,040             |

## Corrected

## Used Amended No. 1040

## Group I

200 Bonds @ \$85.25 17,050.00  
 1,000 Stock @ 32.25 32,250.00

Value of New 49,300.00

## Group II

408 Bonds @ \$85.25 34,782.00  
 2,040 Stock @ 32.25 65,790.00

Value of New 100,572.00

## Group I

200 Bonds @ \$79.00 15,800.00  
 1,000 Stock @ 26.50 26,500.00

Value of New 42,300.00

## Group II

408 Bonds @ \$79.00 32,232.00  
 2,040 Stock @ 26.50 54,060.00

Value of New 86,292.00

| Value New           | Cost Old  | Gain      | Value New           | Cost Old  | Gain      |
|---------------------|-----------|-----------|---------------------|-----------|-----------|
| I 49,300.00         | 12,070.00 | 37,230.00 | I 42,300.00         | 12,070.00 | 30,230.00 |
| II 100,572.00       | 50,646.25 | 49,925.75 | II 86,292.00        | 50,646.25 | 35,645.75 |
| <hr/>               | <hr/>     | <hr/>     | <hr/>               | <hr/>     | <hr/>     |
| 149,872.00          | 62,716.25 | 87,155.75 | 128,592.00          | 62,716.25 | 65,875.75 |
| I 37,230.00 @ 80%   |           | 29,784.00 | I 30,230.00 @ 80%   |           | 24,184.00 |
| II 49,925.75 @ 100% |           | 49,925.75 | II 35,645.75 @ 100% |           | 35,645.75 |
|                     |           | <hr/>     |                     |           | <hr/>     |
| Taxable Gain        | 79,709.75 |           | Reported Amended    |           |           |
| Reported No. 1041   |           |           | No. 1040            |           | 59,829.75 |
|                     |           |           | Corrected           |           | 79,709.75 |
|                     |           |           |                     |           | <hr/>     |
| Additional          | 79,709.75 |           | Additional          |           | 19,880.00 |
|                     | <hr/>     |           |                     |           |           |





|     |  | Exhibit B. |            | Capital<br>Gains | Flat<br>Provision | Balance 2% Tax<br>Ordinary Paid at |        |
|-----|--|------------|------------|------------------|-------------------|------------------------------------|--------|
|     |  | Ratio      | Total      |                  |                   | Net Inc.                           | Source |
| (1) | Trust, Form 1040,<br>Denver, Colo.                       |            | 129,418.23 | 129,418.23       |                   |                                    |        |
| (2) | Mrs. Nellie S. Newton<br>801 York St., Denver, Colo. 5/8 |            | 23,983.22  |                  | 3,000.00          | 20,983.22                          | 2.35   |
| (3) | James Q. Newton, Jr.<br>801 York St., Denver, Colo. 1/8  |            | 7,196.65   |                  | 3,000.00          | 4,196.65                           | .78    |
| (4) | Nancy Newton Davis<br>75 Cherry St., Denver, Colo. 1/8   |            | 7,196.64   |                  | 3,000.00          | 4,196.64                           | .78    |
| (5) | Ruth Newton Pierce<br>230 North St., Buffalo, N. Y., 1/8 |            | 7,196.64   |                  | 3,000.00          | 4,196.64                           | .77    |
|     |  |            | 174,991.38 | 129,418.23       | 12,000.00         | 33,573.15                          | 4.68   |

**Answer.**

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition, except it is admitted that the taxes in controversy are income taxes for the calendar year 1936.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5. A, B, and C, inclusive, denies the matter set forth in *subparagraphs* A, to C, inclusive, of paragraph 5 of the petition, except it is admitted that petitioner surrendered \$10,000.00 face amount of Colorado Industrial Company First Mortgage 5% Bonds in exchange for \$4,000.00 face amount of the Income Mortgage Bonds and 200 shares of the stock of the Colorado Fuel and Iron Corporation.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) J. J. WENCHEL, Chief Counsel,  
Bureau of Internal Revenue.

Of Counsel:

R. P. Hertzog, Division Counsel.

A. R. Shannon, Jr., Special Attorney,  
Bureau of Internal Revenue.

Filed April 18, 1939, United States Board of Tax Appeals.

## [Findings of Fact and Opinion.]

Docket Nos. 97324, 97325. Promulgated August 6, 1940.

Corporation A owned all the stock of B. In 1913 it had acquired substantially all the assets of B. B owed to holders of bonds \$27,633,000, principal amount of first mortgage bonds. A also was a debtor to the holders of the bonds, having guaranteed payment of both principal and interest. When the bonds matured in 1934 A and B defaulted on both principal and interest, and filed petitions for corporate reorganization under section 77B of the Bankruptcy Act. The District Court for Colorado approved a plan of reorganization. Pursuant to this plan all the assets of A and B were transferred to C, a new corporation. The holders of the above bonds received stock and bonds of C in exchange for their bonds and immediately controlled C. Held, the reorganization under section 77B of the Bankruptcy Act constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in section 112 (g) (1) (C).

Richard M. Davis, Esq., and Quigg Newton, Jr., Esq., for the petitioners.

Angus R. Shannon, Jr., Esq., and Carroll Walker, Esq., for the respondent.

In Docket No. 97324, James Q. Newton trust, the Commissioner determined a deficiency in income tax for the year 1936 in the amount of \$12,325.60. Petitioner denies that there is a deficiency in tax and alleges that it has overpaid tax in the amount of \$29,941.07. In Docket No. 97325, James Q. Newton, Jr., the Commissioner determined a deficiency in income tax for the year 1936 in the amount of \$690.84. Petitioner denies that there is a deficiency in tax and alleges that he has overpaid tax in the amount of \$296.59. Each petitioner concedes that some of the adjustments giving rise to the deficiencies have been determined correctly.

The only question involved is whether the exchange of bonds of the Colorado Industrial Co. for stock and bonds of the Colorado Fuel & Iron Corporation, a newly organized corporation, pursuant to a plan of reorganization under section 77B of the

Bankruptcy Act, constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936.

#### Findings of Fact.

The James Q. Newton trust is a fiduciary trust, with its principal office at Denver, Colorado. Prior to September 10, 1936, the James Q. Newton trust owned \$152,000 face amount of Colorado Industrial Co., first mortgage 5 percent bonds due August 1, 1934.

James Q. Newton, Jr., is an individual residing in Denver, Colorado. Prior to September 10, 1936, he held \$10,000 face amount of the same bonds of the Colorado Industrial Co.

The Colorado Industrial Co., hereinafter called Industrial, was a Colorado corporation. It was wholly owned by the Colorado Fuel & Iron Co., hereinafter called Fuel & Iron, a Colorado corporation, which owned all of its capital stock, consisting of 200 shares. Fuel & Iron had been engaged in the manufacture and sale of steel and iron products. Industrial was not engaged in any active business and had no assets of any substantial value, having transferred substantially all of its assets to Fuel & Iron in the year 1913.

Under date of August 1, 1904, Industrial issued bonds, generally known as first mortgage 5 percent bonds, which were secured by a mortgage or deed of trust of Industrial. The bonds matured August 1, 1934. These bonds of Industrial were unconditionally guaranteed both as to principal and interest by Fuel & Iron. These bonds were Industrial's only securities outstanding in the hands of the public. The total face amount of these bonds held by the public on August 1, 1934, was \$27,633,000; in addition, Fuel & Iron owned \$7,741,000 face amount. Industrial defaulted in the payment of interest on these bonds due on August 1, 1933, and on subsequent interest installments; and Fuel & Iron defaulted under its guarantee of interest payments.

Fuel & Iron had outstanding in the hands of the public in 1933 \$4,500,000 face amount of bonds known as general mortgage 5 percent bonds. On August 1, 1933, Fuel & Iron defaulted in the payment of the semiannual interest due on its bonds. On the same day a receiver for the properties of Fuel & Iron was appointed by the United States District Courts of Colorado and Wyoming. Following the receivership of

Fuel & Iron, committees were constituted for the purpose of representing bondholders and stockholders of Fuel & Iron and for the bondholders of Industrial. There was outstanding stock of Fuel & Iron consisting of 20,000 shares of 8 percent cumulative preferred stock, \$100 par value per share, and 340,505 shares of common stock, no par value. The preferred stock was entitled to cumulative dividends at the rate of 8 percent per annum, but ranked equally with the common stock in the distribution of assets. Dividends had not been paid on the preferred stock since November 25, 1931.

On August 1, 1934, when Industrial and Fuel & Iron defaulted on Industrial's first mortgage 5 percent bonds, each company filed petitions with the United States District Court for Colorado instituting proceedings for reorganization under section 77B of the Federal Bankruptcy Act. The previously appointed receiver of Fuel and Iron was appointed trustee of the properties of both companies in the reorganization proceedings.

A plan of reorganization of Fuel & Iron and Industrial, dated March 1, 1935, was drafted by the reorganization managers at the request of the separate committees for the bondholders of the two companies, and this proposed plan, pursuant to section 77B of the Bankruptcy Act, was filed with the District Court. On May 1, 1935, an order of the District Court was entered finding and decreeing that the plan complied with the provisions of subdivision (b) of section 77B of the Bankruptcy Act, and that it had been duly prepared in accordance with subdivision (d) of section 77B. Among other things the court directed the trustee to mail copy of the plan and forms of acceptance of the plan to holders of bonds and stocks of Fuel & Iron, and of bonds of Industrial; which was done. Acceptances of the plan were filed by the holders of Industrial bonds and of the preferred and common stock of Fuel & Iron as follows:

| Security                    | Amount outstanding | Plan approved by holders of— |
|-----------------------------|--------------------|------------------------------|
| Industrial bonds.....       | \$27,633,000       | 75.7%                        |
| Fuel & Iron pfd. stock..... | 20,000 shares      | 61.3%                        |
| Fuel & Iron com. stock..... | 340,505 shares     | 53.2%                        |

On April 25, 1936, the District Court entered its order confirming the plan. By this order the court approved the



certificate of incorporation of a new corporation, the Colorado Fuel & Iron Corporation, hereinafter referred to as the new company. That certificate had been filed in the office of the Secretary of State of Colorado on April 16, 1936. The authorized capital of the new company was 1,000,000 shares of common stock without par value. On June 20, 1936, the District Court entered its order approving forms of documents and directing, among other things, the transfer of all of the assets of Fuel & Iron and Industrial to the new company, which was done by executing proper conveyances.

The purpose of the reorganization plan was as follows:

(1) To strengthen the capital structure of the enterprise, through drastic reduction of fixed charges and the provision of a financing medium for future financial requirements.

(2) To give full recognition to the paramount rights of bondholders.

(3) To enable the stockholders to regain an interest in the enterprise upon a basis which takes account of the present junior rank of the stockholders and of the relative rights and priorities of the two classes of stock.

The effect of the plan was to give to the holders of Industrial's bonds the entire ownership and control of the new company, subject to \$4,500,000 bonds of Fuel & Iron which were not to be disturbed in the reorganization. Since the Industrial bonds were in default on both principal and interest, the only stock of the new company to be issued was 552,660 shares which were to be issued to the holders of Industrial bonds in exchange.

Under the approved plan of reorganization and orders of the District Court the following was done:

(1) As of July 1, 1936, the assets of Fuel & Iron and of Industrial were transferred by proper conveyances to the new company.

(2) The new company issued 552,660 shares of its stock to be distributed to holders of bonds of Industrial, reserved 315,379 shares to be applied against warrants, and reserved the remaining 131,961 shares for corporate purposes. It issued \$11,053,200 principal amount of 5 percent income mortgage bonds due April 1, 1970, to be distributed to Industrial's bondholders. It assumed payment of \$4,500,000 general bonds of

Fuel & Iron, which bonds were not affected by the reorganization plan. It issued warrants for the purchase, on or before April 1, 1950, of 315,379 shares of its stock at \$35 a share to be distributed to the preferred and common stockholders of Fuel & Iron. The warrant agreement entered into between the new company and the Chase National Bank of New York, warrant agent, under date of July 1, 1936, provided that the holders of warrants should not have the right to vote or to receive notice as stockholders, and should have no rights whatsoever as stockholders of the new company. The option price under the warrants was considerably higher than the opening market price for shares of the new company.

(3) The reorganization managers gave notice to the holders of Industrial's bonds and Fuel & Iron's stock that the new securities would be available for distribution on September 1, 1936.

(4) At or about that date the holders of Industrial bonds surrendered their bonds for cancelation in exchange for income mortgage bonds and stock of the new company upon the basis of (a) \$400 principal amount of income bonds and (b) 20 shares of common stock for each \$1,000 principal amount of Industrial bonds. Immediately after the consummation of the plan all of the issued stock of the new company, 552,660 shares of common stock, belonged to the former holders of bonds of Industrial. No stock was issued to parties other than such bondholders until October 23, 1936, when 37 shares were issued upon the exercise of warrants, and by June 30, 1938, only 465 shares had been issued upon the exercise of warrants.

(5) At or about the same date warrants to purchase common stock of the new company were distributed to preferred and common stockholders of Fuel & Iron as follows: For each share of preferred stock of Fuel & Iron, one warrant to purchase, on or before February 1, 1950, three shares of common stock of the new company at \$35 per share. For each share of common stock of Fuel & Iron there was given one warrant to purchase three-fourths of one share of common stock of the new company at \$35 a share.

(6) The capital stock of Industrial was canceled. Also, \$7,741,000 principal amount of Industrial's bonds owned by

Fuel & Iron were canceled. The first mortgage of Industrial which had secured its bonds was satisfied<sup>1</sup> and discharged. These bonds had been held in Fuel & Iron's treasury, but they had not been set up as an asset or liability on the books. The amount of Industrial's bonds that had been carried on Fuel & Iron's books as a liability was \$27,633,000.<sup>1</sup>

On September 10, 1936, petitioner, the James Q. Newton trust, surrendered its Industrial bonds in the face amount of \$152,000 and received in exchange \$60,800 face amount of income mortgage bonds and 3,040 shares of stock of the new company.

On September 10, 1936, the petitioner, James Q. Newton, Jr., surrendered his Industrial bonds in the face amount of \$10,000 and received in exchange \$4,000 face amount of income mortgage bonds and 200 shares of stock of the new company.

On the date of exchange the fair market value of the securities of the new company received in exchange by petitioners was \$79 for each \$100 face amount of income mortgage bonds and \$27.25 for each share of stock. The total fair market value on the date of exchange of the securities of the new company received by the James Q. Newton trust was \$130,872, and the total fair market value on the date of exchange of the new securities received by James Q. Newton, Jr., was \$8,610.

#### Opinion.

Harron: The petitioners contend that the reorganization of Fuel & Iron and Industrial under section 77B of the Bankruptcy Act, which resulted in an exchange of bonds of Industrial for bonds and stock of the new company, constituted a

<sup>1</sup> The aggregate amount of Industrial's bonds in default on August 1, 1934, carried on Fuel & Iron books was \$27,633,000. The Industrial bonds had been set up on Fuel & Iron books as a liability in the following way:

|                             |            |
|-----------------------------|------------|
| Industrial bonds authorized | 45,000,000 |
| Issued                      | 39,000,000 |
| Redeemed and canceled       | 3,626,000  |
|                             | 35,374,000 |
| Less—held in treasury       | 7,741,000  |
| Principal amount in default | 27,633,000 |

reorganization as defined in either provision (A) or (C) of section 112 (g) (1)<sup>2</sup> of the Revenue Act of 1936, so that recognition of gain or loss is precluded under section 112 (a) and (b) (3)<sup>3</sup> of the same act. The petitioners further contend that, if the transaction did not constitute a "reorganization" within the meaning of the above sections, nevertheless any gain resulting therefrom is nontaxable under section 112 (b) (5) of the Revenue Act of 1936.<sup>4</sup>

The respondent contends that there was not a "statutory merger or consolidation" within (A) of section 112 (g) (1), since the facts fail to show that the plan of reorganization

### <sup>2</sup> SEC. 112. RECOGNITION OF GAIN OR LOSS.

(g) Definition of Reorganization.—As used in this section and section 113—

(1) The term "reorganization" means (A) a statutory merger or consolidation, \* \* \* or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form or place of organization, however effected.

### <sup>3</sup> SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges Solely in Kind—

(3) Stock for Stock on Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

### <sup>4</sup> SEC. 112. RECOGNITION OF GAIN OR LOSS.

(b) Exchanges Solely in Kind—

(5) Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange to two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

under section 77B was executed by a merger or consolidation in pursuance of the laws of Colorado or Federal law. Respondent relies upon the statement in article 112 (g)-2 of Regulations 94 that, "The words 'statutory merger or consolidation' refer to a merger or a consolidation effected in pursuance of the corporation laws of the United States or a State or Territory or the District of Columbia." The respondent also contends that the reorganization under section 77B of the Bankruptcy Act does not come within the definition of a reorganization in the applicable revenue act, within (C) of section 112 (g) (1). Respondent argues that the bondholders of Industrial may not be considered as the "stockholders of the transferor." He relies on the fact that stockholders of Fuel & Iron were given warrants to buy stock in the new company. But, conceding for purposes of argument, that the stockholders of the transferor lost their equity in the properties transferred to the new company and that this case comes within the rule of *Commissioner v. Kitzelman*, 89 Fed. (2d) 458; certiorari denied, 302 U. S. 709, respondent argues that the opinion in *LeTulle v. Scofield*, 308 U. S. 415, strongly indicates that the *Kitzelman* case was wrongly decided. Respondent concedes that the facts in the *LeTulle* case differ from and are not analogous to the facts in the *Kitzelman* case or in this case.

Petitioner urges at length that there was a "statutory" consolidation of Industrial and Fuel & Iron under a Federal statute, namely, subsection (b) (9) of section 77B of the Bankruptcy Act. See United States Statutes at Large, 73d Cong., vol. 48-1, pp. 1912-1914.<sup>5</sup> We do not agree with this contention. First, in our opinion the Commissioner's statement in article 112 (g)-2 of Regulations 94, quoted above, appears to be correct and a statement of the obvious. Second, the power to effect a consolidation of corporations "must be derived from the law of the sovereignty or state which creates the

<sup>5</sup> SEC. 77B. Corporate reorganizations— . . .

(b) A plan of reorganization within the meaning of this section . . . (9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation or to other corporations, or the consolidation of the properties of the debtor with those of another corporation, or the merger or consolidation of the debtor into or with another corporation or corporations, or . . .



corporation seeking to exercise it," Fletcher, *Cyclopedia of Corporations*, vol. 15, ch. 61, sec. 7048, and the steps and proceedings to effect a consolidation are formal and must be in accordance with the law of the jurisdiction. Fletcher, *Cyclopedia of Corporations*, supra, secs. 7066-7074. While a corporation formed to carry out steps in a plan of reorganization under section 77B of the Bankruptcy Act may be under the control of the Federal District Court having jurisdiction, a new corporation can come into existence only in compliance with state authority. *Old Fort Improvement Co. v. Lea*, 89 Fed. (2d) 286. In the proceedings involved here, the charter of the new company was obtained from the State of Colorado. The statutes of Colorado prescribe the way in which a consolidation may be consummated. *Comp. Laws of Colorado*, 1921, ch. 28 D., p. 754, sec. 2287; 1935 *Colorado Stats. Ann.*, ch. 41 sec. 54. So far as the facts show, no articles of consolidation or merger were filed in the proper state office. The plan of reorganization approved by the District Court does not refer to a consolidation as the means of executing the plan. The provisions of subsection (b) (9) of section 77B of the Bankruptcy Act provide for several permissive methods of executing a plan of reorganization, among which are a merger or consolidation. But it may not be assumed that a "statutory merger or consolidation" was effected merely from the general facts relating to the way in which a reorganization under section 77B is executed. It is a matter to be proved whether such a plan of reorganization was executed by a statutory merger or consolidation, and, in our opinion, petitioner has not so proved in this case. See also Report of Committee on Ways and Means, No. 704, 73d Cong., 2d sess., p. 14, for the reasons for inserting the word "statutory" before "merger or consolidation" in section 112 (g) (1) (A) of the Revenue Act of 1934.

However, we are of the opinion that the reorganization under section 77B of the Bankruptcy Act constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936, within (C) of section 112 (g) (1). In our opinion the situation here is very much like the situation in the *Kitselman* case, supra, and the question is controlled by that case. In the *Kitselman* case, after the various steps had been taken the bondholders of the old company were in control of the new company, and this somewhat unusual situation presented difficulty because section 112 (g) (1) (C) predicates a reorganization on the requirement

that the transferor or the stockholders of the transferor be in control of the new company. The court reasoned that where the old company is insolvent and its assets are transferred to a new company formed by the bondholders' representatives, the bondholders occupy a status somewhat akin to that of preferred stockholders, for all practical purposes. The court stated the following:

Bondholders ordinarily are viewed as creditors, but when the assets of the corporation are less than its obligations, the bondholders are in actuality and for all practical purposes pretty much the corporation. \* \* \*

It is clear that the bondholders were the moving spirit and were treated as the owners in fact, and it follows that they must be viewed as a class of "stockholders" somewhat akin to preferred stockholders with cumulative dividend rights. \* \* \* Where the assets of the corporation fall far below the amount required to pay the bondholders in full, the bondholders in bankruptcy reorganization supersede the stockholders. They acquire the stockholders' rights to manage the corporate affairs. There is a difference between the position of stockholders in a case like the present one and stockholders of a corporation in bankruptcy proceeding under section 77B (U. S. C. A. § 207) to a reorganization, but the analogies are sufficient to justify a study of the decisions in the latter field.

The above reference in the quotation to a reorganization under section 77B of the Bankruptcy Act is significant here. In our opinion the situation in this case is as favorable, if not more favorable, to petitioner's contention than was the situation in the Kitzelman case, because here there was a reorganization under section 77B of the Bankruptcy Act.

As in the Kitzelman case, the difficulty is that of determining whether the holders of the Industrial bonds were the "transferor or its stockholders" within that clause in (C) of section 112 (g) (1). The situation is somewhat more complex here because there were two transferors, Industrial and Fuel & Iron, albeit they were subsidiary and parent corporations, and the holders of the Industrial bonds were creditors of both companies, Fuel & Iron having acquired substantially all the assets, securing the bonds under a first mortgage, and having unconditionally guaranteed the interest and principal of the bonds of Industrial. However, this complexity is not important,

in our opinion. Neither the bondholders nor the stockholders of either of the old companies received any profit from the reorganization. The old companies transferred all their assets to the new company and immediately thereafter the old companies, through the bondholders, were in control of the corporation to which the assets were transferred. The holders of Industrial bonds were creditors having claims aggregating \$27,633,000 for principal due, and \$2,763,300 for interest due. They were the creditors with prior claims, secured by a first mortgage on assets in the hands of Fuel & Iron, and they were treated as the owners in fact of the assets transferred to the new company. It must follow here, as in the Kitselman case, that the holders of the Industrial bonds be viewed as a class of "stockholders." So viewed, they come within (C) of section 112 (g) (1).

The following is pointed out in support of the above conclusion. Industrial and Fuel & Iron had been placed in receivership and had petitioned for a reorganization under section 77B of the Bankruptcy Act. The stockholders of both of the companies had lost their equity. This was recognized by the plan of reorganization, under which the entire ownership of the new company was turned over to the holders of Industrial bonds, and the stockholders were given, merely, warrants entitling them to purchase stock in the new company at a price considerably above the then market value. The treatment accorded various security holders of the old companies is described in the plan of reorganization as follows:

Under the Plan, the Industrial Bondholders are to receive for each \$1,000 principal amount of Bonds (together with the unpaid interest thereon which amounted to 10% to February 1, 1935): (a) \$400 principal amount of new 5% Income Mortgage Bonds and (b) 20 shares of new Common Stock. The Industrial Bondholders are to receive all of the new Income Mortgage Bond and all of the new Common Stock of the New Company to be presently issued in the reorganization. The entire issue of Industrial Bonds outstanding in the aggregate principal amount of \$27,633,000 is in default. Interest on the Industrial Bonds accrued and unpaid to February 1, 1935 amounts to \$2,763,300. Accordingly, in the first instance, the Plan gives to the holders of the Industrial Bonds the entire ownership and control of the New Company, subject to \$4,500,000 of Fuel Bonds which are undisturbed in the reorganization.

The Plan, however, does not in its effect on stockholders operate as a strict foreclosure, since the stockholders are to receive Warrants entitling them at their option to purchase, at any time until February 1, 1950, a stock equity in the New Company at \$35 per share. The price at which stockholders, under the terms of such Warrants, may regain an equity position in the enterprise, takes into consideration the basis upon which the Industrial Bondholders are to receive shares of new Common Stock in exchange for that part of their debt not covered by new Income Mortgage bonds. [Emphasis supplied.]

The assets of the old companies were transferred to the new company, and immediately thereafter the bondholders were in control of the new company by virtue of the immediate transfer of 552,660 shares of stock of the new company to the reorganization managers, who were the agents of the bondholders. The holders of warrants to purchase new stock in the new company had no control. Control relates to issued, not to authorized, stock. *Louangel Holding Corporation v. Anderson*, 9 Fed. Supp. 550; *C. T. Investment Co. v. Commissioner*, 88 Fed. (2d) 582. Clearly there was an exchange of securities in one corporation a party to a reorganization, in pursuance of a plan of reorganization, solely for securities in another corporation a party to the reorganization. (Sec. 112 (b) (3).) All three corporations were parties to the reorganization. (Sec. 112 (g) (2).) The bondholders of Industrial retained a substantial stake or proprietary interest in the enterprise. There was a continuity of interest of the transferors in the transferee, evidenced by stocks and bonds of the new company. The holders of Industrial bonds acquired the stockholders' rights to manage the corporate affairs.

With respect to the argument of respondent that the opinion in the *LeTulle* case indicates that the decision in the *Kitselman* case is wrong and that *Helvering v. Tyng*, 308 U. S. 527, also points that way, we believe the argument without merit. The fact that the bondholders herein retained a proprietary interest in the enterprise is a material difference between the factual situation in this case and the factual situation in either the *LeTulle* case or the *Tyng* case. Such cases are therefore clearly distinguishable and not applicable here. In the *LeTulle* case when a stockholder of the transferor received bonds and



cash of the transferee in exchange for his stocks, there was no continuity of interest. In the Tyng case, where the stockholders of the transferors received cash and long term indebtedness of the transferee in exchange for their stock, there was no continuity of interest. In both the LeTulle case and the Tyng case stockholders of the transferor became mere creditors of the transferee, whereas in this case creditors (the Industrial bondholders) became stockholders of the transferee, and after the transfer they were in control of the corporation to which the assets were transferred. Also, we believe that E. P. Raymond, 37 B. T. A. 423, cited by respondent, is not applicable here. The point in this case is that the bondholders received all the presently issued stock of the new company, thereby gaining control thereof.

It is held that the reorganization under section 77B of the Bankruptcy Act was executed so as to constitute a reorganization as defined in section 112 (g) (1) (C), and the gain or loss resulting therefrom is not recognizable under section 112 (b) (3). See also Commissioner v. Newberry Lumber & Chemical Co., 94 Fed. (2d) 447; Marlborough House, Inc., 40 B. T. A. 882; Edith M. Greenwood, 41 B. T. A. 664; Alabama Asphaltic Limestone Co., 41 B. T. A. 324.

In view of the foregoing it is not necessary to consider whether or not the transactions come within section 112 (b) (5).

Reviewed by the Board.

Decision will be entered under Rule 50.

Van Fossan, Leech, Turner, and Disney dissent.

Murdock dissents for reasons expressed in his dissent in Alabama Asphaltic Limestone Co., 41 B. T. A. 324.

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#### Decision.

Pursuant to the Board's Findings of Fact and Opinion promulgated August 6, 1940, the petitioner herein having on September 4, 1940, filed a recomputation of tax, and the respondent having agreed thereto, now, therefore, is is

Ordered and Decided: That there is an overpayment in



income tax of \$317.88 for the year 1936, which amount was paid within three years before the filing of the petition. (Sec. 809 (a), Revenue Act of 1938.)

(Seal)

(s) MARION J. HARRON, Member.

Entered September 6, 1940.

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Petition for Review and Assignments of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States; that the respondent on review, James Q. Newton, Jr. (hereinafter referred to as the taxpayer), is a citizen of the United States residing in Denver, Colorado. The taxpayer filed his Federal income tax return for the taxable year 1936 with the Collector of Internal Revenue for the District of Colorado, whose office is located in the City of Denver, Colorado, and within the judicial circuit of the United States Circuit Court of Appeals for the Tenth Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II.

Prior Proceedings.

\* On December 3, 1938, the Commissioner<sup>o</sup> determined a deficiency in Federal income tax liability against the taxpayer for the year 1936 in the amount of \$690.84 and sent to the taxpayer, by registered mail, a notice of said deficiency in

accordance with the provisions of existing internal revenue laws. Thereafter and on March 2, 1939, the taxpayer filed an appeal from said determination of the Commissioner with the United States Board of Tax Appeals.

The case was duly tried to the United States Board of Tax Appeals and on August 6, 1940, the Board promulgated its findings of fact and opinion (42 B. T. A. No. 73), pursuant to which opinion decision was entered on September 6, 1940, wherein and whereby it was ordered and decided that there is an overpayment in income tax for the year 1936 in the amount of \$317.88.

### III.

#### Nature of Controversy.

Prior to September 10, 1936, the taxpayer was the owner of \$10,000 face amount of first mortgage 5 per cent bonds of the Colorado Industrial Company, a Colorado corporation (hereinafter referred to as Industrial), which bonds were due on August 1, 1934. The capital stock of Industrial was wholly owned by the Colorado Fuel & Iron Company (hereinafter called Fuel & Iron) and its bonds were unconditionally guaranteed as to principal and interest by the latter company. Industrial's bonds of the face amount of \$27,633,000 were held by the public on August 1, 1934 and \$7,741,000 face amount thereof was held by Fuel & Iron. Industrial defaulted in the payment of interest on its bonds on August 1, 1933 and on subsequent interest installments, and Fuel & Iron defaulted under its guarantee of interest payments.

In 1933 Fuel & Iron had \$4,500,000 face amount of general mortgage 5 per cent bonds outstanding in the hands of the public. It defaulted in the payment of the semi-annual interest due on those bonds on August 1, 1933. On the latter date a receiver was appointed for Fuel & Iron's properties by the United States District Courts of Colorado and Wyoming. When the two corporations later defaulted on Industrial's first mortgage 5 per cent bonds, on August 1, 1934, each company filed a petition with the United States District Court of Colorado seeking a reorganization under Section 77B of the Federal Bankruptcy Act, whereupon the receiver previously appointed for Fuel & Iron was appointed trustee of the properties of both companies. On April 25, 1936, the District Court con-

firmed a plan of reorganization previously filed with the Court and accepted by a majority of Industrial's bondholders and Fuel & Iron's common and preferred stockholders. The court approved the certificate of incorporation of a new corporation, the Colorado Fuel & Iron Corporation, and on June 20, 1936, entered its order directing, among other things, the transfer of all of the assets of Fuel & Iron and Industrial to the new corporation which was done, as of July 1, 1936 by the execution of proper conveyances.

Under the plan of reorganization as approved by the Court, the only stock of the new company to be issued was 552,660 shares which were to be issued to the holders of Industrial's bonds in exchange. Pursuant to the plan the new company issued 552,660 shares of its stock to be distributed to the holders of Industrial's bonds, reserved 315,379 shares to be applied against warrants which it issued, in accordance with the plan, to the preferred and common stockholders of Fuel & Iron, and reserved the remaining 131,961 shares for corporate purposes. The warrants were issued, under the plan, to enable Fuel & Iron's stockholders to regain an interest in the enterprise, if they so desired, at \$35 a share on or before April 1, 1950, but the warrant agreement filed with the Chase National Bank of New York, warrant agent, provided that the holders of warrants should have no rights whatsoever as stockholders of the new company. During the year 1936, only 37 shares of stock of the new company were issued by reason of the exercise of warrants. The new company also issued, pursuant to the plan, \$11,053,200 principal amount of five per cent income mortgage bonds due April 1, 1970, to be distributed to Industrial's bondholders, and assumed payment of \$4,500,000 face amount of Fuel & Iron's general bonds. Industrial's bondholders thereupon gained the entire ownership and control of the new company subject to the \$4,500,000 bonds of Fuel & Iron which were not disturbed in the reorganization.

On September 10, 1936, the taxpayer surrendered his industrial bonds in the face amount of \$10,000 and received therefor \$4,000 face amount of income mortgage bonds and 200 shares of stock of the new company. In his original Federal income tax return the taxpayer reported no gain or loss on the exchange. In his notice of deficiency the Commissioner treated the exchange as a taxable one. The taxpayer contended that

the Section 77B reorganization of Fuel & Iron and Industrial constituted a non-taxable reorganization under Section 112 of the Revenue Act of 1936. The Board of Tax Appeals agreed with the taxpayer's contention and redetermined the tax liability accordingly.

#### IV.

##### Assignments of Error.

The Commissioner avers that in the record and proceedings before the United States Board of Tax Appeals and in the opinion and final decision rendered and entered by the United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceedings, opinion, and final decision so rendered and entered by the United States Board of Tax Appeals:

The United States Board of Tax Appeals erred—

1. In ordering and deciding that there is an overpayment in income tax for the year 1936 in the amount of \$317.88.
2. In failing to sustain the deficiency determined by the Commissioner, less a proper reduction of said deficiency to reflect the adjustments agreed upon by the parties at the hearing before the United States Board of Tax Appeals.
3. In holding and deciding that the reorganization under Section 77B of the Bankruptcy Act constituted a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).
4. In failing to hold and decide that the reorganization under Section 77B of the Bankruptcy Act did not constitute a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).
5. In holding that there was a continuity of interest of the transferors in the transferee within the scope and meaning of Section 112 (g) (1) (C) of the Revenue Act of 1936.
6. In holding and deciding that the gain resulting to the

taxpayer from the exchange was not recognizable under Section 112 (b) (3).

7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Tenth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

(s) SAMUEL O. CLARK, JR.,  
Assistant Attorney General.

(Signed) J. P. WENCHEL, Chief Counsel,  
R. L. W.  
Bureau of Internal Revenue.

Of Counsel: Charles E. Lowery, Special Attorney, Bureau of Internal Revenue.

[Verification omitted.]

Filed November 26, 1940, United States Board of Tax Appeals.

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Notice of Filing Petition for Review.

To: Mr. James Q. Newton, Jr.,  
Colorado National Bank Building,  
Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of November, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 26th day of November, 1940.

B. D. GAMBLE,  
Clerk, United States Board of  
Tax Appeals.



Service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this 29th day of November, 1940.

(s) RICHARD M. DAVIS,  
(s) QUIGG NEWTON, JR.,

Counsel for Respondent on Review.

Filed Dec. 2, 1940.

---

**Notice of Filing Petition for Review.**

To:

Mr. James Q. Newton, Jr.,  
Colorado National Bank Building,  
Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of November, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error is hereto attached and served upon you.

Dated this 26th day of November, 1940.

(Signed) J. P. WENCHEL, RLW,  
Chief Counsel,  
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of November, 1940.

(s) JAMES Q. NEWTON, Respondent on Review.

Filed Dec. 5, 1940. United States Board of Tax Appeals.

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**Statement of Points.**

Comes now the petitioner on review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to-wit:

**The United States Board of Tax Appeals erred—**

1. In ordering and deciding that there is an overpayment in income tax for the year 1936 in the amount of \$317.88.

2. In failing to sustain the deficiency determined by the Commissioner, less a proper reduction of said deficiency to reflect the adjustments agreed upon by the parties at the hearing before the United States Board of Tax Appeals.

3. In holding and deciding that the reorganization under Section 77B of the Bankruptcy Act constituted a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

4. In failing to hold and decide that the reorganization under Section 77B of the Bankruptcy Act did not constitute a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

5. In holding that there was a continuity of interest of the transferors in the transferee within the scope and meaning of Section 112 (g) (1) (C) of the Revenue Act of 1936.

6. In holding and deciding that the gain resulting to the taxpayer from the exchange was not recognizable under Section 112 (b) (3).

7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

(Signed) J. P. WENCHEL, CAR,  
Chief Counsel,  
Bureau of Internal Revenue.

Statement of Service: A copy of this Statement of Points was mailed to attorneys on review this date, January 8, 1941.

(Signed) J. P. WENCHEL, CAR,  
Chief Counsel,  
Bureau of Internal Revenue.

Filed January 8, 1940, United States Board of Tax Appeals.

**Designation of Portions of Record to be Contained in  
Record on Review.**

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Tenth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
  - (a) Petition, including annexed copy of deficiency letter and statement attached thereto.
  - (b) Answer.
3. Findings of fact and opinion promulgated August 6, 1940.
4. Decision entered September 6, 1940.
5. Petition for review, together with proof of service of notices of filing petition for review and of service of a copy of petition for review.
6. Statement of Points.
7. This designation of portions of record to be contained in record on review.

Signed J. P. WENCHEL, CAR  
Chief Counsel,  
Bureau of Internal Revenue.

Statement of Service: A copy of this designation of portions of record to be contained in record on review was mailed to attorneys for respondent on review this date, January 8, 1941.

(Signed) J. P. WENCHEL, CAR,  
Chief Counsel,  
Bureau of Internal Revenue.

Filed January 8, 1941, United States Board of Tax Appeals.

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**Order Enlarging Time.**

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation and transmission of the record *sur* petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Tenth Circuit, be and it is hereby extended to February 24, 1941.

(Signed) CHARLES P. SMITH, Member.

Now, February 7th, 1941, the foregoing is certified from the record as a true copy. B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

Dated: Washington, D. C., Dec. 21, 1940. jd.

Filed February 11, 1941, Robert B. Cartwright, Clerk.

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[Clerk's Certificate.]

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 44, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of February, 1941.

(Seal)

B. D. GAMBLE, Clerk,

United States Board of Tax Appeals.

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Filed February 11, 1941, Robert B. Cartwright, Clerk.

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[Supplemental Transcript of Record.]

**Stipulation of Facts.**

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective counsel, that the following is a true statement of the facts here involved:

1. Petitioner now is an individual resident of Denver,

Colorado, with his office at 215 Colorado National Bank Building, Denver, Colorado. The income tax returns here involved (copies of which, marked, respectively, Exhibits "A" and "B", are attached hereto and by this reference made a part hereof) were filed with the Collector of Internal Revenue for the District of Colorado, at Denver, Colorado. At all times herein mentioned Petitioner has kept his books and filed his returns on a cash receipts and disbursements basis.

2. The notice of deficiency, (copy of which is attached hereto, marked Exhibit "C"), was mailed to Petitioner on December 3, 1938.

3. The taxes in controversy consist of income taxes for the calendar year 1936, in two amounts:

(a) The amount of \$269.59 which Petitioner paid under protest upon filing his amended return and which Petitioner claims is an overpayment.

(b) The amount of \$690.84 stated in Respondent's notice of deficiency, less certain deficiencies which are uncontroverted and which Petitioner admits, amounting to approximately \$270.46 more or less, which amount is to be adjusted.

The total amount in controversy, therefore, does not exceed \$960.43.

4. On March 12, 1935 there was filed in the District Court of the United States, for the District of Colorado, In the Matter of The Colorado Fuel and Iron Company and Another, Colorado Corporations, Debtors, Consolidated Cause No. 8081, a Plan of Reorganization (a copy of which, marked "Exhibit D" is attached hereto and by reference made a part hereof). At that time The Colorado Fuel and Iron Company had outstanding its own General Mortgage Five Per Cent. Bonds, preferred stock and common stock, and it was also the guarantor on the First Mortgage Five Per Cent. Bonds of The Colorado Industrial Company, a wholly owned subsidiary. These bonds of The Colorado Industrial Company were its only securities outstanding in the hands of the public. Both of these corporations were before the Court on their petitions for reorganization under Section 77-B of the Bankruptcy Act, filed August 1, 1934.



5. On March 12, 1935 the Court entered its order finding that the Plan had been proposed in accordance with the provisions of Section 77-B and ordering that the holders of Colorado Industrial Company Bonds and the preferred and common stockholders of The Colorado Fuel and Iron Company be notified of the Plan and given the opportunity to express their acceptance thereof. Copies of said Order and of the form of acceptance for bonds in registered and in bearer form, marked Exhibits "E", and "F" and "G", are attached hereto and by this reference made a part hereof.

6. On April 25, 1936 the Court entered its Findings of Fact and Conclusions of Law and its Order confirming the Plan of Reorganization and finding that it was fair and equitable and did not discriminate unfairly in favor of any class of creditors or stockholders. A copy of these Findings, Conclusions and Order, marked Exhibit "H", is attached hereto and by this reference made a part hereof. The Plan of Reorganization, as so approved, provided that a new company should be organized with an authorized capital of 1,000,000 shares of stock and \$11,053,200.00 Five Per Cent. Income Mortgage Bonds. The new company was to assume the payment of the General Mortgage Five Per Cent. Bonds of The Colorado Fuel and Iron Company. It was to issue \$11,053,200.00 of its Income Mortgage Bonds and 552,660 shares of its stock in exchange for the bonds of The Colorado Industrial Company guaranteed by The Colorado Fuel and Iron Company, in the ratio of \$400.00 face value of new bonds and 20 shares of stock for each \$1,000.00 face amount of Colorado Industrial Company bonds. Since the Industrial Company bonds were then in default on both principal and interest, such 552,660 shares issued to the holders of Industrial Bonds were the only shares of the new company to be presently issued. The new company was to give to the preferred and common stockholders of the old Colorado Fuel and Iron Company merely warrants to purchase certain specified amounts of stock of the new company at \$35.00 per share on or before February 1, 1950, which option price was considerably higher than the opening market price for shares of the new

company. Three Hundred fifteen thousand, three hundred seventy-nine shares of stock of the new company were reserved for this purpose. Thus, the Plan provided that 1,000,000 shares of the new Company should be authorized. Of this number, 552,660 shares were to be issued to the holders of Industrial Bonds; 315,379 shares were to be reserved to apply against warrants, when, as and if the option were exercised; and the remaining 131,961 shares were reserved for corporate purposes.

7. In pursuance of the Plan of Reorganization and the Orders of April 25, 1936, the new company, The Colorado Fuel and Iron Corporation, was organized under the laws of the State of Colorado, and on June 20, 1936 the Court entered its Order approving the form of documents and directing the transfer of assets to, and the issuance of securities and assumption of liabilities by, the new company. A copy of this Order, marked "Exhibit I", is attached hereto and by this reference made a part hereof. It provided that on July 1, 1936, The Colorado Fuel and Iron Company, The Colorado Industrial Company, Arthur Roeder, Trustee of the assets of both, and The New York Trust Company, as Trustee under the Colorado Industrial Company mortgage, should convey to The Colorado Fuel and Iron Corporation all their right, title and interest in all of the assets of The Colorado Fuel and Iron Company and the Colorado Industrial Company. Simultaneously, or promptly thereafter, The Colorado Fuel and Iron Corporation was directed to deliver to, or on the order of, the Reorganization Managers \$11,053,200.00 of its Income Bonds, 552,660 shares of its stock and warrants representing the right to purchase 315,379 shares of its stock. Simultaneously, or promptly thereafter, The New York Trust Company, as Trustee of this first mortgage of the Industrial Company, was directed to execute a satisfaction and discharge of the First Mortgage of the Industrial Company. As soon as reasonably practicable, the Reorganization Managers were directed to distribute to the holders of Industrial Bonds the new Income Bonds and all of the stock of the new company to be issued, and to distribute to the preferred and com-

mon stockholders of the old company warrants to purchase stock in accordance with the terms of the warrant agreement. A copy of said warrant agreement, marked "Exhibit J", is attached hereto and made a part hereof.

8. The Order further provided as follows (Ar. Two, Par. F, p. 7):

"The provisions of this Order directing the transfer and delivery of the properties and assets of the Debtors to the New Company, the assumption by the New Company of certain obligations of the Debtors and of the Trustee as hereinabove and in Article Three hereof provided, and the issue by the New Company to or on the order of, and the distribution by, the Reorganization Managers of the New Securities, shall be a single and entire order and direction, notwithstanding the provisions hereof permitting the transfer of said properties and assets forthwith and without awaiting the assumption by the New Company of said liabilities or the issue, delivery and distribution of the New Securities."

Similarly it directed that any dividends or interest paid with respect to any of the new securities during the period when such new securities were held by the Reorganization Managers or distributing agents should be held by them and paid to the holders of the Industrial Bonds as soon as the physical exchange was effected.

9. Pursuant to Article Five of said Order of June 20th, the Reorganization Managers gave notice to the holders of Industrial Bonds that the new securities would be available for distribution on September 1, 1936. A copy of this notice, marked "Exhibit K", is attached hereto and by this reference made a part hereof. Thereafter, on September 10, 1936, the petitioner surrendered its \$10,000.00 face amount of Colorado Industrial Company First Mortgage Five Per Cent. Bonds in exchange for \$4,000.00 face amount of the Income Mortgage Bonds and 200 shares of the stock of The Colorado Fuel and Iron Corporation. At the same time and in due course the other holders of Industrial Bonds surrendered their certificates for cancellation in exchange for Income

Bonds and shares of stock in the new company upon the same basis as provided in the Plan.

10. Pursuant to the Order of June 20, 1936, the properties of The Colorado Fuel and Iron Company and the Colorado Industrial Company, and all the right, title and interest of the Trustees under the Industrial Company Mortgage were transferred to the new company as of July 1, 1936, as is recited in the final report of the Reorganization Trustee, dated September 12, 1938 and filed September 13, 1938. A copy of said conveyance, marked "Exhibit L", and an extract from said report, marked "Exhibit M", are attached hereto and by this reference made a part hereof. By June 30, 1938, \$11,029,200.00 face value Income Bonds and 551,460 shares of stock in the new company had been distributed in exchange for Industrial Bonds pursuant to the Plan and the Order of April 25, 1936, leaving only \$24,000.00 face value of Income Bonds and 1200 shares of stock still to be distributed. On the same date all but 1,714 shares of preferred stock in the old company, out of 20,000 shares, and all but 20,572 shares of common stock in the old company, out of 340,505 shares, had been exchanged for warrants. On the same date only 465 shares of stock in the new company had been issued for cash upon the exercise of the warrants; all as recited in Exhibit "M", the extract from the Final Report of the Trustee. The first exercise of the warrant options for purchase of stock in the new company occurred on October 23, 1936, and it was for 37 shares.

11. Immediately after the consummation of the plan of liquidation, 552,660 shares of stock of the new company were issued, and all of these shares belonged to the holders of Industrial Bonds in accordance with the provisions of the Plan and the order of April 25, 1936. No stock was issued to parties other than the Industrial bondholders until October 23, 1936, and by June 30, 1938 only 465 shares had been issued to other parties (the 465 shares referred to above as issued upon the exercise of warrants). The warrant agreement, Exhibit "J", provided, in Article Twelfth thereof, that the holders of warrants should not have the right to vote

or to receive notice as stockholders, nor should they have any rights whatsoever as stockholders.

12. On the date of exchange the fair market value of the securities received in exchange for Industrial Bonds was \$79.00 for each \$100.00 face amount of Income Bonds and \$27.25 for each share of stock in the new company, a total of \$8,610.00.

By Order of Court, dated October 12, 1938, and filed November 18, 1938, copy of which, marked "Exhibit "N", is attached hereto and by this reference made a part hereof, the reorganization proceedings were concluded and the Trustee discharged.

It is further stipulated and agreed that either party hereto may introduce such further and additional evidence, not inconsistent with the facts above stipulated, as may be material to any of the issues herein, and that the exhibits attached hereto and referred to herein may be given the same force and effect as if the same had been duly offered and received in evidence in open court.

Dated this 19th day of September, 1939.

QUIGG NEWTON, JR.,

Quigg Newton, Jr.,

RICHARD M. DAVIS,

Richard M. Davis,

Counsel for Petitioner. W.

J. P. WENCHEL,

J. P. Wenchel, RPH

Chief Counsel,

Bureau of Internal Revenue.

Filed Sep. 21, 1939. U. S. Board of Tax Appeals.

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Supplemental Designation of Portions of Record to Be  
Contained in Record on Review.

To the Clerk of the United States Board of Tax Appeals:

In addition to the documents and records heretofore certified and transmitted by you to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit in connection with the petition for review filed by the Commissioner of Internal



Revenue, in this proceeding, you will please prepare, transmit and deliver to the clerk of said Court one copy duly certified of each of the following:

1. Stipulation of facts, including list of exhibits attached hereto, and Exhibits A, B and C but omitting Exhibits D to N, inclusive,
2. This supplemental designation.

— (Signed) J. P. WENCHEL, RLW

J. P. Wenchel, Chief Counsel,  
Bureau of Internal Revenue.

**Statement of Service:**

A copy of this Supplemental Designation of portions of record to be contained in record on review was mailed to attorneys for respondent on review this date, March 19, 1941.

J. P. WENCHEL,

J. P. Wenchel, Chief Counsel,  
Bureau of Internal Revenue.

Filed Mar. 19, 1941, United States Board of Tax Appeals.

**[Clerk's Certificate.]**

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 28, inclusive, contain and are a true copy of the supplemental transcript of record, papers, and proceedings on file and of record in my office as called for by the supplemental Praecept in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of March, 1941.

B. D. GAMBLE, Clerk,  
United States Board  
of Tax Appeals.

(Seal)

Filed March 26, 1941. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

*Motion*

Now comes the Commissioner of Internal Revenue, by his attorney, Samuel O. Clark, Jr., Assistant Attorney General, and shows to the Court that the above entitled causes, being Board of Tax Appeals Docket Numbers 97325 and 97324, respectively, were consolidated for hearing and decision in the Board of Tax Appeals; that, under date of August 6, 1940, the Board of Tax Appeals promulgated one opinion in the two proceedings; that the two proceedings in this Court involve substantially identical facts and the issues of law therein are the same; that, while separate records are being printed in the two cases due to separate stipulations of facts before the Board, there has been designated for printing only in the Newton Trust case exhibits "A" to "N," inclusive, attached to the stipulation therein; that these exhibits are common to the two cases and were so considered by the Board of Tax Appeals in its decision.

Wherefore, counsel for the Commissioner of Internal Revenue moves the Court that the two above entitled causes be consolidated for purposes of briefing and argument in this Court and that the exhibits "A" to "N," inclusive, designated for printing in the Newton Trust case, be taken and considered for all purposes as forming a part of the printed record in the case of Commissioner v. James Q. Newton, Jr.

SAMUEL O. CLARK, Jr.,  
Assistant Attorney General.

Filed February 21, 1941, Robert B. Cartwright, Clerk.

*Order*

Thirty-ninth Day, January Term, Monday, April 7th A. D. 1941

Before Honorable ORIE L. PHILLIPS and Honorable ROBERT E. LEWIS, Circuit Judges

These causes came on to be heard on the motion of petitioner for the consolidation of the causes for the purpose of oral argument and were submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that these

causes be and the same are hereby consolidated for the purpose of oral argument.

*Order of submission*

Thirty-sixth Day, April Term, Wednesday, June 25th A. D. 1941

Before Honorable ORIE L. PHILLIPS; Honorable WALTER A. HUXMAN and Honorable ALFRED P. MURRAH, Circuit Judges

This cause came on to be heard and was argued by counsel, Arthur A. Armstrong, Esquire, appearing for petitioner, Richard Davis, Esquire, appearing for respondent.

On motions, petitioner was granted leave to file a reply brief herein within ten days from this day and respondent was granted leave to file an answer thereto within ten days thereafter.

Thereupon, this cause was submitted to the court.

United States Circuit Court of Appeals, Tenth Circuit

Nos. 2267 and 2268. APRIL TERM, 1941

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JAMES Q. NEWTON, JR., RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JAMES Q. NEWTON TRUST, RESPONDENT

On Petitions to Review the Decisions of the United States Board of Tax Appeals

July 24, 1941

Arthur A. Armstrong, Sp. Asst. to the Atty. Gen. (Samuel O. Clark, Jr., Asst. Atty. Gen., and Sewall Key and Samuel H. Levy, Sp. Assts. to the Atty. Gen., were with him on the brief) for petitioner.

Richard M. Davis (Quigg Newton, Jr., and Newton, Davis and Drinkwater were with him on the brief) for respondent

Before PHILLIPS, HUXMAN, and MURRAH, Circuit Judges

PHILLIPS, Circuit Judge, delivered the opinion of the court

The ultimate questions here presented are identical with those considered by the court in Number 2270—Commissioner of Internal

Revenue v. Cement Investors, Inc., this day decided, the facts being substantially the same, except as to the amount of bonds involved and the cost thereof to the respective taxpayers.

Therefore, on authority of Commissioner of Internal Revenue v. Cement Investors, Inc., the orders of the Board of Tax Appeals are respectively Affirmed.

A true copy. 4

Attest:

*Clerk U. S. Circuit Court  
of Appeals, Tenth Circuit.*

*Judgment*

Forty-eighth Day, April Term, Thursday, July 24th A. D. 1941

Before Honorable ORIE L. PHILLIPS, Circuit Judge, and Honorable  
J. FOSTER SYMES, District Judge

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said United States Board of Tax Appeals be and the same is hereby affirmed.

On August 30, 1941, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States Board of Tax Appeals.

*Clerk's certificate*

*United States Circuit Court of Appeals, Tenth Circuit:*

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true, and complete copy of the transcript of the record from the United States Board of Tax Appeals, and full, true, and complete copies of certain pleadings, record entries, and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2267, wherein Commissioner of Internal Revenue was petitioned and James Q. Newton, Jr., was respondent, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the

Tenth Circuit, at my office in Denver, Colorado, this 9th day of September A. D. 1941.

[SEAL]

ROBERT B. CARTWRIGHT,  
*Clerk of the United States Circuit Court  
 of Appeals, Tenth Circuit.*  
 By GEORGE A. PEASE,  
*Deputy Clerk.*

*Clerk's certificate*

*United States Circuit Court of Appeals, Tenth Circuit?*

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true, and complete copy of the transcript of the record from the United States Board of Tax Appeals, and full, true, and complete copies of certain pleadings, record entries, and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2268, wherein Commissioner of Internal Revenue was petitioner and James Q. Newton Trust was respondent, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 9th day of September A. D. 1941.

[SEAL]

ROBERT B. CARTWRIGHT,  
*Clerk of the United States Circuit Court  
 of Appeals, Tenth Circuit.*

By GEORGE A. PEASE,  
*Deputy Clerk.*



## Supreme Court of the United States

No. 646 —, October Term, 1941

*Order allowing certiorari*

March 9, 1942

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1941**

**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER**

**v.**

**CEMENT INVESTORS, INC.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH  
CIRCUIT**

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2

# In the Supreme Court of the United States

OCTOBER TERM, 1941

\_\_\_\_\_  
No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

CEMENT INVESTORS, INC.  
\_\_\_\_\_

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH  
CIRCUIT**

\_\_\_\_\_  
The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in the above case on July 24, 1941.

**OPINIONS BELOW**

The opinion of the United States Board of Tax Appeals (R. 13-22) is unpublished. The opinion of the Circuit Court of Appeals (R. 194-200) is not yet reported.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1941 (R. 200). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Pursuant to a Section 77B plan, corporate assets were transferred to a new company, new bonds and stock distributed to former bondholders, and the stock interests eliminated except for the receipt of stock purchase warrants. The question is whether gain should be recognized upon the taxpayer's exchange of bonds for new bonds and stock. The answer depends upon (1) whether the exchange was tax-free under Section 112 (b) (3) of the Revenue Act of 1936, which in turn depends upon the basic question whether the plan constituted a "reorganization" within the definition of Section 112 (g) (1); or (2) whether the exchange constituted a tax-free transfer under Section 112 (b) (5).

### STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 8-12.

### STATEMENT

Prior to September 2, 1936, the taxpayer owned \$44,000 face amount of Colorado Industrial Com-

pany first mortgage 5% bonds due August 1, 1934 (R. 14), which had an adjusted basis of \$14,893.25 (R. 9, 37). On September 2, 1936, the bonds were exchanged in a Section 77B proceeding for \$17,600 principal amount of income mortgage bonds and 880 shares of stock of a new company, The Colorado Fuel and Iron Corporation (R. 18).

The fair market value of the new securities received in the exchange was \$37,884 (R. 36-37), exceeding the cost basis of the old by \$22,990.75. The Commissioner determined the deficiencies on the grounds that the profit from this exchange was a taxable gain (R. 9).

The primary facts concerning the Section 77B proceeding were as follows:

The Colorado Industrial Company (hereinafter referred to as Industrial) was a wholly owned subsidiary of The Colorado Fuel and Iron Company (hereafter referred to as Fuel & Iron) (R. 14). The companies in 1934 had outstanding in the hands of the public the following classes of securities (R. 14):

|             |       |                                       |
|-------------|-------|---------------------------------------|
| Fuel & Iron | ----- | \$4,500,000 general mortgage 5% bonds |
|             |       | 20,000 shares 8% \$100 par value      |
|             |       | cumulative preferred stock;           |
| Industrial  | ----- | 340,505 shares no par common stock    |
|             |       | \$27,633,000 first mortgage 5% bonds. |

Industrial's Bonds were unconditionally guaranteed by Fuel & Iron both as to principal and interest. Industrial itself was not engaged in active business and had no assets of substantial value;

virtually all of its properties had been transferred to Fuel & Iron in 1913 (R. 14).

Interest payments due August 1, 1933, on both bond issues were defaulted and receivers were appointed the same day for the properties of Fuel & Iron by the United States District Courts in Colorado and Wyoming. On August 1, 1934, the companies defaulted in the payment of the principal of Industrial's bonds, and each filed a petition under Section 77B of the Bankruptcy Act in the United States District Court for the District of Colorado (R. 14-15).

A plan of reorganization, dated March 1, 1935, was formulated, and after approval by committees for the bondholders and stockholders, was proposed by the debtors pursuant to Section 77B (d) of the Bankruptcy Act (R. 15, 61, 67). The plan provided for the formation of a new company, The Colorado Fuel and Iron Corporation, to which all the assets of the debtor companies would be transferred, subject to the lien of Fuel & Iron's general mortgage bonds (R. 15, 16, 73). The new company (hereafter referred to as Fuel & Iron Corporation) would assume the obligations on the general mortgage bonds, and would issue \$11,053,200 of income mortgage bonds and 552,660 shares of common stock which would be distributed in exchange for the Industrial bonds (R. 16). The stockholders of the debtor companies would receive no interest in the new company, but in ex-

change for their stock would be given warrants for the purchase of an aggregate of 315,379 shares of the new stock at \$35 per share (R. 16-17).

Pursuant to direction of the court, the plan was submitted to the holders of the Industrial bonds and the Fuel & Iron preferred and common stock for acceptance by the requisite percentage under Section 77B. It was accepted by holders of 75.7% of the bonds, 61.3% of the preferred stock, and 53.2% of the common stock, and thereupon on April 25, 1936, was confirmed by the District Court and duly consummated (R. 15).

Immediately after the consummation of the plan, all of the issued stock of Fuel & Iron Corporation, 552,680 shares, belonged to former holders of the bonds of Industrial (R. 17). No stock was issued to other parties until October 23, 1936, when 37 shares were issued upon the exercise of warrants. Only 465 shares had thus been issued by June 3, 1938 (R. 17).

The warrant agreement provided that the holders of warrants should not have the right to vote or to receive notice as stockholders, and should have no rights whatsoever as stockholders of the new company (R. 16-17). The option price under the warrants was considerably higher than the opening market price for shares of the new companies (R. 17).

The Board of Tax Appeals, rejecting the Commissioner's position, held that the transaction constituted a "reorganization" within the definition



of Section 112 (g) (1) of the Revenue Act of 1936, and that, therefore, gain or loss would not be recognized under Section 112 (b) (3) (R. 22). The court below affirmed the decision of the Board both on this ground and on the further ground that gain or loss would not be recognized under Section 112 (b) (5).

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

(1) In holding that the taxpayer's securities had been exchanged pursuant to a plan of "reorganization," and that therefore gain would not be recognized.

(2) In holding that Section 112 (b) (5) precluded recognition of gain upon the exchange of the taxpayer's securities.

(3) In failing to hold that the gain realized upon the exchange of the taxpayer's securities should be recognized under Section 112 (a).

(4) In sustaining the decision of the Board of Tax Appeals.

#### **REASONS FOR GRANTING THE WRIT**

This case presents the same basic question, whether there is a "reorganization" under the revenue laws, as that involved in *Commissioner v. Bondholders Committee, Marlborough Investment Co.*, 118 F. (2d) 511 (C. C. A. 9), and *Commissioner v. Palm Springs Holding Corp.*, 119 F. (2d) 846 (C. C. A. 9), pending on the taxpayers' petitions for certiorari, Nos. 128, 129, and 503, respectively; and in *Commissioner v. Southwest Consol.*

*Corp.*, 119 F. (2d) 561 (C. C. A. 5), and *Commissioner v. Alabama Asphaltic Limestone Co.*, 119 F. (2d) 819 (C. C. A. 5), pending on the Government's petitions, Nos. 286 and 328.<sup>1</sup> The differences are that the problem arises here in connection with a transfer under Section 77B of the Bankruptcy Act, rather than at judicial sale, and that the issue is whether gain or loss may be recognized upon the exchange of securities, rather than the basis for the corporate assets in the hands of the new corporation. Since these differences do not affect the essential question, the considerations set forth in our prior petitions support issuance of the writ here.

A second question is raised by the alternate holding of the court below that Section 112 (b) (5) of the Act precluded recognition of the taxpayer's gain. It is our position that this section is inapplicable to any phase of this transaction.<sup>1</sup> The court's conclusion, however, injects an added complication into the situation which provides a further reason for review.

#### CONCLUSION

It is therefore respectfully submitted that this petition should be granted.

CHARLES FAHY,  
*Acting Solicitor General.*

SEPTEMBER 1941.

<sup>1</sup> The application of Section 112 (b) (5) was urged but not determined in the *Southwest Consol.* case, *supra*. See Government's petition for certiorari, p. 9, n. 6.

## APPENDIX

Revenue Act of 1936, 49 Stat. 1648:

### SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

(3) *Stock for Stock on Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(5) *Transfer to Corporation Controlled by Transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(g) *Definition of Reorganization.*—As used in this section and section 113—

(1) The term “reorganization” means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock; of at least persons solely in exchange for stock or 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however affected.

\* \* \* \*

(h) *Definition of Control.*—As used in this section the term “control” means the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

\* \* \* \*

Bankruptcy Act of July 1, 1898, 30 Stat. 544, as amended by Act of June 7, 1934, 48 Stat. 911, 912:

SEC. 77B. CORPORATE REORGANIZATIONS.—

\* \* \* \*

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of

them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise;

\* \* \* (9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation or to other corporations, or the consolidation of the properties of the debtor with those of another corporation, or the merger or consolidation of the debtor into or with another corporation or corporations, or the retention of the property by the debtor, the distribution of assets among creditors or any class thereof, the satisfaction or modification of liens, indentures, or other similar instruments, the curing or waiver of defaults, extension of maturity dates of outstanding securities, the change in interest rates and other terms of such securities, the amendment of the charter of the debtor, and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; (10) may deal with all or any part of the property of the debtor and may include any other appropriate provisions not inconsistent with this section. \* \* \*

(U. S. C., Title 11, Sec. 207.)

Treasury Regulations 94, promulgated under the Revenue Act of 1936.

ART. 112 (g)-1. *Purpose and scope of exception of reorganization exchanges.—Pur-*



pose: Under the general rule, upon the exchange of property, gain or loss must be accounted for if the new property differs in a material particular, either in kind or in extent, from the old property. The purpose of the reorganization provisions of the Act is to except from the general rule certain specifically described exchanges incident to such readjustments of corporate structures, made in one of the particular ways specified in the Act, as are required by business exigencies, and which effect only a readjustment of continuing interests in property under modified corporate forms.

Requisite to a reorganization under the Act are a continuity of the business enterprise under the modified corporate form, and a continuity of interest therein on the part of those persons who were the owners of the enterprise prior to the reorganization. The Act recognizes as a reorganization the change (made in a specified way) from a business enterprise conducted by a single corporation to the same business enterprise conducted by a parent and a subsidiary corporation, but not the creation of a temporary subsidiary as a device for the making of an ordinary dividend. The Act recognizes as a reorganization the amalgamation (occurring in a specified way) of two corporate enterprises under a single corporate structure if there exists among the holders of the stock and securities of either of the old corporations the requisite continuity of interest in the new corporation, but there is not a reorganization if the holders of the stock and securities of the old corporation are merely the holders of short-term notes in the new corporation. In order to exclude transactions not intended to be in-

cluded, the specifications of the reorganization provisions of the law are precise. Both the terms of the specifications and their underlying assumptions and purposes must be satisfied in order to entitle the taxpayer to the benefit of the exception from the general rule. Accordingly under the Act, a short-term purchase money note is not a security of a party to a reorganization, an ordinary dividend is to be treated as an ordinary dividend, and a sale is nevertheless to be treated as a sale, even though the mechanics of a reorganization have been set up.

\* \* \* \* \*

ART. 112 (g)-2. *Definition of terms.*—The application of the term “reorganization” is to be strictly limited to the specific transaction set forth in section 112 (g) (1). The term does not embrace the mere purchase by one corporation of the properties of another corporation, for it imports a continuity of interest on the part of the transferor or its stockholders in the properties transferred. If the properties are transferred for cash and deferred payment obligations of the transferee evidenced by short-term notes, the transaction is a sale and not an exchange.

\* \* \* \* \*



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No. 644

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*In the Supreme Court of the United States*

OCTOBER TERM, 1941

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GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

CEMENT INVESTORS, INC.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT

---

BRIEF FOR THE PETITIONER

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1941**

---

**No. 644**

**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER.**

**u.**

**CEMENT INVESTORS, INC.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT**

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**BRIEF FOR THE PETITIONER**

---

## **OPINIONS BELOW**

The opinion of the United States Board of Tax Appeals (R. 13-22) is unpublished. The opinion of the Circuit Court of Appeals (R. 194-200) is reported in 122 F. (2d) 380.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered July 24, 1941. (R. 200-201.) The petition for a writ of certiorari was filed on September 23, 1941. Following denial on February 9, 1942, a petition for rehearing was filed on February 28,

1942, and the petition was granted on March 9, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Pursuant to a Section 77B plan, corporate assets were transferred to a new company, new bonds and stock distributed to former bondholders, and the stock interests eliminated except for the receipt of stock purchase warrants. The question is whether gain should be recognized upon the taxpayer's exchange of bonds for new bonds and stock. The answer depends upon (1) whether the exchange was tax-free under Section 112 (b) (3) of the Revenue Act of 1936, which in turn depends upon whether the plan constituted a "reorganization" within the definition of Section 112 (g) (1); or (2) whether the exchange constituted a tax-free transfer under Section 112 (b) (5).

#### STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 30-38.

#### STATEMENT

Prior to September 2, 1936, the taxpayer owned \$44,000 face amount of Colorado Industrial Company first mortgage 5% bonds due August 1, 1934 (R. 14), which had an adjusted basis of \$14,893.25 (R. 18). On September 2, 1936, the bonds were

exchanged in a proceeding under Section 77B of the Bankruptcy Act for \$17,600 principal amount of income mortgage bonds and 880 shares of stock of a new company, The Colorado Fuel and Iron Corporation. (R. 18.)

The fair market value of the new securities received in the exchange was \$37,884 (R. 36-37), exceeding the basis of the old by \$22,990.75. The Commissioner determined deficiencies in income, excess profits and surtax on the ground that the profit from this exchange was a taxable gain. (R. 9, 13.)

The facts concerning the Section 77B proceeding are as follows:

The Colorado Industrial Company (hereinafter referred to as Industrial) was a wholly owned subsidiary of The Colorado Fuel and Iron Company (hereinafter referred to as Fuel & Iron). (R. 14.)

The companies in 1934 had outstanding in the hands of the public the following classes of securities (R. 14):

|             |   |
|-------------|---|
| Fuel & Iron | \$4,500,000 general mortgage 5% bonds;<br>20,000 shares 8% \$100 par value cumulative preferred stock;<br>340,507 shares no par common stock. |
| Industrial  | \$27,633,000 first mortgage 5% bonds.   |

Industrial's bonds were unconditionally guaranteed by Fuel & Iron both as to principal and interest. Industrial itself was not engaged in active business and had no assets of substantial value; virtually all of its properties had been transferred to Fuel & Iron in 1913. (R. 14.)

Interest payments due August 1, 1933, on both bond issues were defaulted and receivers were appointed the same day for the properties of Fuel & Iron by the United States District Courts in Colorado and Wyoming. On August 1, 1934, the companies defaulted in the payment of the principal of Industrial's bonds, and each filed a petition under Section 77B of the Bankruptcy Act in the United States District Court for the District of Colorado. (R. 14-15.)

A plan of reorganization, dated March 1, 1935, was formulated, and after approval by committees for the bondholders and stockholders was proposed by the debtors pursuant to Section 77B (d) of the Bankruptcy Act. (R. 15.) The plan provided for the formation of a new company, The Colorado Fuel and Iron Corporation, to which all the assets of the debtor companies would be transferred, subject to the lien of Fuel & Iron's general mortgage bonds. (R. 15, 16, 73.) The new company (hereinafter referred to as Fuel & Iron Corporation) would assume the obligations on the general mortgage bonds, and would issue \$11,053,200 of income mortgage bonds and 552,660 shares of common stock which would be distributed in exchange for the Industrial bonds. (R. 16.) The stockholders of the debtor companies would receive no interest in the new company, but in exchange for their stock would be given warrants for the pur-



chase of an aggregate of 315,379 shares of the new stock at a specified price. (R. 16-17.)

Pursuant to direction of the court, the plan was submitted to the holders of the Industrial bonds and the Fuel & Iron preferred and common stock for acceptance by the requisite percentage under Section 77B. It was accepted by holders of 75.7% of the bonds, 61.3% of the preferred stock, and 53.2% of the common stock, and thereupon on April 25, 1936, was confirmed by the District Court and duly consummated. (R. 15.)

The following steps were among those taken in effecting the plan: (1) The assets of Fuel & Iron and Industrial were transferred by proper conveyance to the new company. (2) The new company issued its securities for distribution to the security holders pursuant to the provisions of the plan. (3) The reorganization managers notified the security holders that the new securities would be available for distribution on September 1, 1936. On or about that date the holders of Industrial bonds surrendered their bonds for cancellation in exchange for the bonds and stock of the new company, and the warrants were distributed to the new stockholders. (4) The first mortgage of Industrial which had secured its bonds was satisfied and discharged. (R. 16-17.)

Immediately after the consummation of the plan all of the issued stock of Fuel & Iron Corporation,

552,660 shares, belonged to former holders of the bonds of Industrial. (R. 17.) No stock was issued to other parties until October 23, 1936, when 37 shares were issued upon the exercise of warrants. Only 465 shares had thus been issued by June 30, 1938. (R. 17.)

The warrant agreement provided that the holders of warrants should not have the right to vote or to receive notice as stockholders, and should have no rights whatsoever as stockholders of the new company. (R. 16-17.) The option price under the warrants was considerably higher than the opening market price for shares of the new companies. (R. 17.)

The Board of Tax Appeals, rejecting the Commissioner's position, held that the transaction constituted a "reorganization" within the definition of Clause C of Section 112 (g) (1) of the Revenue Act of 1936, and that, therefore, gain or loss would not be recognized under Section 112 (b) (3). (R. 22.) The court below affirmed the decision of the Board both on this ground and on the further ground that gain or loss would not be recognized under Section 112 (b) (5). (R. 194-200.)

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

(1) In holding that the taxpayer's securities had been exchanged pursuant to a plan of "reorganization," and that therefore gain would not be recognized.

(2) In holding that Section 112 (b) (5) precluded recognition of gain upon the exchange of the taxpayer's securities.

(3) In failing to hold that the gain realized upon the exchange of the taxpayer's securities should be recognized under Section 112 (a).

(4) In sustaining the decision of the Board of Tax Appeals.

#### SUMMARY OF ARGUMENT

This case corresponds in all essential particulars to *Helvering v. Southwest Consolidated Corp.*, No. 286, decided February 2, 1942. That decision makes it clear that this transaction did not constitute a reorganization within the definition of the revenue laws. Accordingly, the exchange of securities was not made in pursuance of a plan of reorganization within the meaning of Section 112 (b) (3), and under the reorganization provisions of the statute, gain or loss should be recognized.

The issue thereupon presented is whether resort nevertheless may be had to the provisions of Section 112 (b) (5) in order to avoid recognition. This section, however, is applicable only where the subject of the transaction is disposed of by the transferor as property and is received by the transferee corporation as property in consideration for the securities issued in return. The "property" must pass as an asset from one to the other.

As the facts of this case illustrate, the property dealt with in a Section 77B plan, and which is

transferred to the new company, is the physical assets of the debtor, not its securities. The exchange of securities is a separate phase of the transaction in which the new company itself plays no direct part. It is not a second transfer of property to the new company somehow superimposed upon the one which actually takes place.

In making the exchange, the individual security holders do not transfer any property, either to the new company or to anyone else. Rather, upon surrender of the bonds for cancellation, the property interest in the securities is terminated. Conversely, the old bonds are never received as property by the new company.

Consideration of the statute as a whole, moreover, shows that the reorganization provisions of the statute were intended to be all-inclusive in dealing with the tax consequences of intercorporate transactions of this character. Injection of Section 112 (b) (5) into the situation, in order to provide a special exception for an exchange of securities which did not qualify under Section 112 (b) (3), is inconsistent with the framework upon which the statute is constructed. It destroys the synchronization which the reorganization provisions establish in these situations between the non-recognition provisions of Section 112 and the basis provisions of Section 113. It cannot be supposed that Congress intended such a fundamental incongruity.

Similarly, analysis of the facts, together with the Court's decision in *Helvering v. Southwest Con-*

*solidated Corp., supra*, makes it clear that the transaction cannot be construed as a transfer of the assets of the debtor companies by the bondholders within the meaning of Section 112 (b) (5).

#### ARGUMENT

*Introductory.*—Insolvency reorganizations, like that involved here, normally present several immediate tax problems. One is the basis of the corporate assets in the hands of the new company, and the governing principles with respect thereto under the 1934 Act and subsequent statutes have been authoritatively established in *Helvering v. Southwest Consolidated Corp.*, No. 286, decided February 2, 1942. A cognate question is whether the individual security holders recognize taxable gain or deductible loss upon the exchange of their securities. That is the question presented by the instant case.

The Government's position is that the statute requires correlative disposition of both questions. If there is a reorganization within the statutory definition and the old basis of the assets carries over under section 113 (a) (7) of the Act, gain or loss will not be recognized upon the exchange of securities under section 112 (b) (3). The application of both these sections depends upon whether there was a reorganization under Section 112 (g) (1). But if, as here, there is not a reorganization under the authority of the *Southwest Consolidated*



case, and therefore the old basis does not carry over, gain or loss should be recognized. We submit that there is no warrant for the inconsistent treatment of the two issues which would result if the decision below were affirmed.

# I

THE TAXPAYER DID NOT EXCHANGE ITS SECURITIES IN PURSUANCE OF A PLAN OF REORGANIZATION WITHIN THE MEANING OF SECTION 112 (g) (1)

The opinion in *Helvering v. Southwest Consolidated Corp.* establishes the error of the court below in concluding that this transaction was a Clause C reorganization.

The two cases involve identical definitions of the term "reorganization",<sup>1</sup> and their facts correspond in all essential particulars. Each involved a readjustment, effected through judicial proceedings, in which the assets of the old corporation were transferred to a new corporation, and all the securities of the new company, except for stock purchase warrants, were distributed to the old creditors. In each case, the former stockholders received only the warrants; their interests were otherwise eliminated. In holding that the transaction in the *Southwest Consolidated* case did not qualify as a "reorganization" under Clause C of Section 112 (g) (1), the Court said:

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<sup>1</sup> Sections 112 (g) (1) of the Revenue Acts of 1934 and 1936.

That clause requires that "immediately after the transfer" the "transferor or its stockholders or both" be in "control" of the transferee corporation. "Control" is defined in § 112 (h) as "the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation." Here "control" at the critical date was not in the old corporation or its "stockholders". The participating creditors had received pursuant to the plan rights to receive over a majority of the stock of the new company even though all of the warrants allocated to stockholders had been issued and exercised. The contrary conclusion was reached in *Commissioner v. Cement Investors, Inc.*, 122 F. 2d 380, 384, on the theory that the bondholders of the insolvent predecessor company could be regarded as its "stockholders" within the meaning of § 112 (g) (1) (C), since they had acquired an equitable interest in the property and were empowered to supplant the stockholders. We have adopted that theory in *Helvering v. Alabama Asphaltic Limestone Co.*, *supra*, in determining whether the bondholders had retained a sufficient continuity in interest so as to bring the transaction within the statutory definition of merger or consolidation contained in the revenue acts prior to 1934. But it is one thing to say that the bondholders "stepped into the shoes of the old stockholders" so as to ac-

quire the proprietary interest in the insolvent company. It is quite another to say that they were the "stockholders" of the old company within the purview of clause C. In the latter Congress was describing an existing, specified class of security holders of the transferor corporation. That class, as we have seen, received a participation in the plan of reorganization. For purposes of clause C they must be counted in determining where "control" over the new company lay. They cannot be treated under clause C as something other than "stockholders" of the old company merely because they acquired a minority interest in the new one. Indeed clause C contemplates that the old corporation or its stockholders, rather than its creditors, shall be in the dominant position of "control" immediately after the transfer and not excluded or relegated to a minority position. Plainly the normal pattern of insolvency reorganization does not fit its requirements.

We submit that the *Southwest Consolidated* decision is determinative of the question here, particularly in view of the Court's express reference to this case. To be sure, the readjustment in the *Southwest Consolidated* case was effected in a receivership proceeding whereas this case involves a proceeding under Section 77B of the Bankruptcy Act. But this difference in the "procedural devices" employed to carry out the plan cannot be material. Cf. *Helvering v. Alabama Asphaltic*

*Limestone Co.*, No. 328, decided February 2, 1942. In both cases, the decisive fact is that neither the old corporation nor its "stockholders" were in control of the new.

The court below based its decision solely on Clause C. This was the only clause which the taxpayer argued was applicable.<sup>2</sup> It may be noted, however, that the *Southwest Consolidated* decision also disposes of any possibility that Clause B, D, or E might apply. In that case, Clause B was held inapplicable because the new company did not acquire the assets *solely* for voting stock as that clause requires; in addition, warrants had been issued and cash paid. Here the new company issued bonds and warrants, as well as common stock, in return for the assets. Clauses D and E are likewise inapplicable since, as this Court stated—

There was not that reshuffling of a capital structure within the framework of an existing corporation contemplated by the term "recapitalization." And a transaction which shifts the ownership of the proprietary interest in a corporation is hardly "a mere change in identity, form, or place of organization" within the meaning of clause E.

Since, therefore, the taxpayer did not exchange its securities in pursuance of a plan of "reorganization,"<sup>2</sup> the non-recognition provisions of Sec-

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<sup>2</sup> The taxpayers in the two companion cases (*Helvering v. James Q. Newton Trust* and *Helvering v. James Q. Newton*,

tion 112 (b) (3) are inapplicable. The real issue before the Court is whether recognition of gain or loss upon the exchange may nevertheless be avoided under Section 112 (b) (5).

## II

THE TAXPAYER'S EXCHANGE OF SECURITIES WAS NOT A TRANSFER OF PROPERTY WITHIN THE MEANING OF SECTION 112 (b) (5)

1. The inapplicability of Section 112 (b) (5) to a surrender of the securities of the old corporation in exchange for those of the new in a receivership or a Section 77B proceeding is shown at the outset by the plain language of the statute. Section 112 (b) (5) applies where "property" has been "transferred" to a controlled corporation. Like the other provisions of Section 112 (b) through (g), it creates a special exception to the general rule of Section 112 (a) requiring the recognition of all gains or losses upon sales or exchanges, and consequently it must be strictly construed; its meaning cannot be extended beyond the precise terms of the language employed. Treasury Regulations 94, Art.

*Jr.*, Nos. 645 and 646, respectively) have argued that Clause A is applicable to render the transaction a "reorganization" within Section 112 (g) (1). This contention was rejected by the Board of Tax Appeals in *Newton v. Commissioner*, 42 B. T. A. 473, and it was not passed upon by the court below. We discuss it in our brief filed here in those two cases. The taxpayer in the instant case stated in its brief below (p. 26) its agreement with our view that Clause A does not apply.



112 (a)-1; Paul, Studies in Federal Taxation (3d Series) 53-54. To regard the exchange involved here as a "transfer" of "property" within this section would give those words a context far different from their normal meaning:

It should be plain that "property is transferred," within the meaning of Section 112 (b) (5), only where the "property" is both *disposed of* by the transferor as *property* and is *received* by the transferee corporation as *property* in consideration for the securities issued in return. The subject of the transaction must pass as property from one to the other. It must survive the transaction as an asset in the hands of the transferee.

That Section 112 (b) (5) thus assumes the continuance of the property in the hands of the transferee is confirmed by the correlative provision of Section 113 (a) (8), which prescribes the basis for "property \* \* \* acquired \* \* \* by a corporation \* \* \* by the issuance of its stock or securities in connection with a transaction described in Section 112 (b) (5)".<sup>3</sup> The construction is also borne out by Article 112 (b) (5)-2 of the Regulations, which *inter alia*, provides that

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<sup>3</sup> Cf. also Section 113 (a) (6), which after providing generally for the basis of property acquired upon an exchange described in Section 112 (b) to (e), inclusive, states: "This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it."

every person who receives "stock or securities of a controlled corporation for property under Section 112 (b) (5) shall file with his income tax return . . . a complete statement . . . including . . . a description of the property transferred, or of his interest in such property", and that "such controlled corporation" shall file with its return a "full description of all property received from the transferors." Treasury Regulations 94, Art. 112 (b) (5)-2, Appendix, *infra*.

It should also be clear that the exchange of securities in a Section 77B or receivership proceeding is not a transfer of property by the old security holders to the new company. The property dealt with in the plan, and which is transferred to the new company, is the physical assets of the debtor, not its securities. As the Court recognized in the *Southwest Consolidated* case, these assets are acquired from the debtor (not from the security holders), and it is in exchange for this property that the new company issues its securities.

Completion of the plan, of course, also involves an exchange of securities by the individual security holders. But in making the exchange, the security holders do not transfer property to the new company. They merely surrender their old claims for cancellation (either to the debtor, or to the trustee or reorganization managers acting in its behalf) and take the new securities, which

have been issued by the new company in exchange. The obligations of the debtor companies are thereupon discharged. The property interest in the old securities is terminated, and never passes from the security holders either to the new company or to anyone else. The physical instruments remain at most an historical value.\*

Conversely, the old bonds are never received as property by the new company. The exchange, indeed, is a separate phase of the transaction in which the new company itself plays no part. Ordinarily, as here, it will not even take possession of the physical instruments in the mechanics of effecting the exchange. At no point in the proceeding does the new company become the owner of the bonds of the old, with all the rights of a creditor of the old, as it necessarily would if the bonds had been "transferred" to it.

2. This distinction between the transfer of the assets of the debtor to the new company and the exchange of the securities is recognized by the provisions of Section 77B itself. Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended by Act of June 7, 1934, c. 424, 48 Stat. 911, Sec. 1 (U. S. C., Title 11, Sec. 207). Subsection (b) (9) provides that the plan "shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the prop-

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\* See 19 Fletcher, *Cyclopedia of Corporation Law* (Permanent Ed.), § 9395. Ordinarily the old instruments will be destroyed. *Ibid.*

erty of the debtor to another corporation \* \* \* and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes," and Subsection (b) (10) provides that the plan "may deal with all or any part of the property of the debtor". Under Subsection (h), the "property dealt with by the plan", when transferred to the other corporation, "by the trustee or trustees", or by the debtor, if it has been retained in possession, shall be free and clear of all claims of the debtor, its stockholders and creditors, except those which may consistently with the plan be reserved. The final decree, on the other hand, "shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid." See *In re Corona Radio & Television Corp.*, 102 F. (2d) 959, 962 (C. C. A. 7th); *In re James Butler Grocery Co.*, 100 F. (2d) 376, 378 (C. C. A. 2d).

The plan in the instant case was carried out in accordance with these provisions. The plan provided for the creation of a new company to "acquire directly or otherwise all of the assets" of Fuel & Iron and Industrial (R. 73-74) and stated, as one of its objectives, that the "\$27,633,000 of funded debt, represented by the Industrial Bonds, is to be replaced in part by \$11,053,200 of new 5% Income

Mortgage Bonds due in 1970 and in part by common stock." (R. 69.)

Following confirmation, the court, on June 20, 1936, entered an "Order Approving the Form of Documents and Directing the Transfer of Assets to, and the Issue of Securities and Assumption of Liabilities by, the New Company." (R. 131-142.) In this order the debtor companies, the reorganization trustee and the indenture trustee were directed to transfer all their interests in the assets to the new company, in exchange for the new securities to be issued to or on the order of the reorganization managers. (R. 133-134.) The indenture trustee was directed to execute a proper instrument satisfying and discharging the Industrial mortgage. (R. 135-136.)

Article Four of the order set forth the manner and terms of distribution of the new securities. (R. 138-140.) It was provided that the reorganization managers, as soon as reasonably practical after the issuance of the new securities, should distribute them to the old stockholders, subject to "reasonable regulations and instructions governing the endorsement and surrender of securities of the Debtors." (R. 138.) The new securities would be distributed "Upon surrender to the Reorganization Managers, or to the Distributing Agents, of outstanding Industrial Bonds or certificates of Preferred and Common Stock of the Fuel and Iron Company \* \* \*". (R. 139.)

This order was duly carried out. An indenture and bill of sale was executed which transferred the



assets of the debtors to the new company in consideration of the issuance of the new securities. (R. 170-179.) The security holders were duly notified by the reorganization managers that the new securities were ready for distribution. (R. 168-170.) They were advised that in order to obtain the securities they "must surrender their bonds or stock certificates" to the distributing agents. (R. 168.) As found by the Board, their bonds were thereupon surrendered for "cancellation." (R. 17.)

Thereafter, on October 12, 1938, the court entered its final decree providing (R. 190-191)—

That all debts and liabilities of The Colorado Fuel and Iron Company and of The Colorado Industrial Company, Debtors, and all rights and interests of the stockholders of said Debtors, and each of them, be and the same are discharged, \* \* \* \* All creditors and stockholders of said Debtors and each of them are hereby enjoined from enforcing or attempting to enforce in any manner or form whatsoever any rights, claims or demands against said Debtors, or against The Colorado Fuel and Iron Corporation, or the officers, agents, or stockholders thereof, or against the assets of The Colorado Fuel and Iron Corporation, save and except in the manner and to the extent provided for in said Plan of Reorganization and the orders of Court above mentioned.

Every aspect of the plan, as thus carried out, negatives the notion that the exchange of the secu-

rities constituted a transfer of property to the new company. Although the transaction must be considered as a whole (*Helvering v. Southwest Consolidated Corp., supra*), it necessarily involved two phases: first, the transfer of the corporate assets to the new company, and, secondly, the exchange of securities. The very nature of the transaction leaves no room for the argument that property was transferred to the new company by this exchange. The property dealt with in the plan had already been transferred and the new securities issued by the new corporation. These new securities were then distributed in order to replace the interests represented by the old cancelled obligations. It is impossible, even in a metaphysical sense, to conceive of this phase of the transaction as constituting a second transfer of property somehow superimposed upon the first.

3. The question whether a bond is transferred as property, when it is surrendered for cancellation and the claim discharged, is akin to that presented in *Fairbanks v. United States*, 306 U. S. 436. In that case, the Court held that upon redemption of a corporate bond, the bondholder, surrendering his security, did not sell or exchange a capital asset within the meaning of Section 208 (a) (1) of the Revenue Act of 1926, and Section 101 (c) (1) of the Revenue Act of 1928.\* Cf. *Helvering v. Flaccus*

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\* Revenue Act of 1926, c. 27, 44 Stat. 9:

"SEC. 208. (a) For the purposes of this title—

*Leather Co.*, 313 U. S. 247. A contrary result would have been called for, if it could be said in the present situation that the surrender of a claim, upon receipt of new securities in satisfaction of the obligation, constitutes a transfer of property.

Even more closely in point are those decisions holding that where a secured claim is surrendered and cancelled, upon acquisition of the security, the creditor has not sold or exchanged a capital asset. *Bingham v. Commissioner*, 105 F. (2d) 971 (C. C. A. 2d); *Commissioner v. National Bank of Commerce*, 112 F. (2d) 946 (C. C. A. 5th); *Commissioner v. Spreckels*, 120 F. (2d) 517 (C. C. A. 9th); see *Commissioner v. Electro-Chemical E. Co.*, 110 F. (2d) 614, 616 (C. C. A. 2d), affirmed, 311 U. S. 513; cf. *Hale v. Helvering*, 85 F. (2d) 819 (App. D. C.). These cases turned on the ground that the surrender was not a transfer of the property to the debtor. As stated in *Bingham v. Commissioner* (105 F. (2d) at 972):

What may have been property in the hands of the holder of the notes simply vanished when the surrender took place and the maker received them. He then had, at most, only his own obligations to pay himself. Any theoretical concept of a sale of the

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"(1) The term 'capital gain' means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921; \* \* \* Except for formal differences, Section 101 (c) (1) of the Revenue Act of 1928, c. 852, 45 Stat. 791, is the same.

notes to the maker in return for what he gave up to get them back must yield before the hard fact that he received nothing which was property in his hands but had merely succeeded in extinguishing his liabilities by the amounts which were due on the notes. There was, therefore, no sale of the notes to him in the ordinary meaning of the word and no exchange of assets for assets since the notes could not, as assets, survive the transaction. That being so, such a settlement as the one this petitioner made involved neither a sale nor an exchange of capital assets within the meaning of the statute. *Hale v. Helvering*, *supra*; *United States v. Fairbanks*, 9 Cir., 95 F. 2d 794; *Fairbanks v. United States*, 59 S. Ct. 607, 608, 83 L. Ed. 855; *Felin v. Kyle*, 3 Cir. 102 F. 2d 349.

Conversely, the situation here is readily distinguishable from one in which intangibles are transferred *as property* to a controlled corporation. *Portland Oil Co. v. Commissioner*, 109 F. (2d) 479 (C. C. A. 1st), certiorari denied, 310 U. S. 650; *P. A. Birren & Son v. Commissioner*, 116 F. (2d) 718 (C. C. A. 7th). Thus, a transfer of securities by an individual to a personal holding company in exchange for its stock would fall within Section 112 (b) (5), but in that situation the transferred securities would represent "property" in the hands of the transferee corporation.

4. Consideration of the revenue statute as a whole, moreover, shows that Section 112 (b) (5)

was not intended to provide nonrecognition of gain or loss upon an exchange of securities in an intercorporate transaction which is not a "reorganization" under Section 112 (g).

The reorganization provisions of the statute cover every taxable phase of a typical intercorporate transaction: the exchange of securities (Section 112 (b) (3)); the transfer of the corporate assets (Section 112 (b) (4)); the basis of the new securities (Section 113 (a) (6)); and the basis of the property received by the transferee (Section 113 (a) (7)). They are patterned on the theory that in these situations there should be a definite correlation between the disposition of the two questions of nonrecognition of gain or loss and the carry-over of basis. Thus, in each instance, the application of the provisions depends upon the existence of a "reorganization" within the definition of Section 112 (g) (1). If there is a reorganization, gain or loss will not be recognized either upon the corporate transfer (Section 112 (b) (4)) or upon the exchange of securities (Section 112 (b) (3)); the basis of the new securities received in the exchange will be the same as that of the old (Section 113 (a) (6)); and the basis of the assets in the new company will be the same as in the hands of the old (Section 113 (a) (7)). Conversely, if there is not a reorganization, gain or loss will be recognized and new cost bases will be taken.\*

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\* Development of this theory of uniformity is illustrated by amendments adopted to Section 113 (a) (7). When the



Since the reorganization provisions thus present a comprehensive scheme for dealing with intercorporate transfers, and since those provisions do not confer the exemption sought by the taxpayer herein, it is not to be supposed that Congress intended to alter the operation of those provisions by resort to Section 112 (b) (5). Section 112 (b) (5) was intended to have an independent sphere of operation where an individual transferred property to a controlled corporation. Of course, there may be overlapping between Section 112 (b) (5) and Section 112 (g) (1) (C), where a *corporation* transfers property to a controlled corporation. But in that situation the tax consequences, both as to non-recognition and basis, are the same whether Section 112 (b) (5) or the reorganization provisions are employed, and the correlation between

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counterpart of this provision was first enacted in 1924 it contained the requirement that not only must the assets have been acquired in connection with a reorganization but also that "immediately after the transfer an interest or control in such property of 80 per centum or more remained in the same persons or any of them." Revenue Act of 1924, c. 234, 43 Stat. 253, Section 204 (a) (7). In 1932, the requirement was reduced to 50%. Revenue Act of 1932, c. 209, 47 Stat. 169, Section 113 (a) (7). Finally, the requirement was eliminated entirely with respect to transactions occurring after December 31, 1935. Section 113 (a) (7), Revenue Act of 1936, c. 690, 49 Stat. 1648, as amended by Section 807 of the Revenue Act of 1938, c. 289, 52 Stat. 447. See H. Rep. No. 1860, 75th Cong., 3d Sess., p. 32 (1939-1<sup>st</sup> Cum. Bull. (Part 2) 728, 751). Consequently, synchronization is now complete.

the non-recognition and the basis provisions is preserved. See Section 113 (a) (8) and 113 (a) (6), Appendix, *infra*, pp. 33, 32.

In this case, however, the application of Section 112 (b) (5) would run counter to the reorganization provisions, and would destroy the synchronization which Congress established between the non-recognition provisions of Section 112 and the basis provisions of Section 113. Since there is no reorganization here, the basis of the assets in the hands of the new company is not their basis in the hands of the old corporation under Section 113 (a) (7), but their cost upon acquisition. *Helvering v. Southwest Consolidated Corp.*, *supra*. Consistently with this result, the reorganization provisions contemplate that gain or loss should be recognized upon the exchange of the securities. This correlation was plainly intended and generally had been assumed to exist.<sup>7</sup>

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<sup>7</sup>In the consideration of the *Southwest Consolidated* case and companion cases (*Bondholders Committee et al. v. Commissioner*, Nos. 128-129, *Helvering v. Alabama Asphaltic Limestone Co.*, No. 328, and *Palm Springs Holding Corp. v. Commissioner*, No. 503, all decided by this Court February 2, 1942), the taxpayers involved protested that our position on the basis issue was inconsistent with the Commissioner's prior denial of losses upon the exchange of securities. We pointed out that while in the past it had been necessary administratively to take the position in each case that was necessary to protect the revenues, we recognized that if a new cost basis was adopted for the new com-

Resort to Section 112 (b) (5) to reach a contrary result produces an obvious and fundamental incongruity. If the securities received in the exchange do not provide a sufficient continuity of interest under the statute to warrant a carry-over of the old basis, it must follow that there is not a sufficient identity of interest between the old and the new securities to warrant non-recognition of gain or loss to the individual holders. We can perceive no justification for attributing to Congress an intention to adopt inconsistent theories in the disposition of the two questions.

### III

THE TRANSACTION DID NOT CONSTITUTE A TRANSFER OF THE ASSETS OF THE DEBTOR CORPORATIONS BY THE BONDHOLDERS IN RETURN FOR THE NEW SECURITIES WITHIN THE MEANING OF SECTION 112 (b) (5)

The opinion of the court below is susceptible of the interpretation that the taxpayer was entitled

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to a corollary gain or loss should be recognized upon the exchange of the securities. (*Southwest Consolidated case*, Br. 10, 13-14.)

It should be observed that the Government's position in the instant case cuts both ways. If sustained the Government would tax a gain in this case, but by the same token would recognize losses incurred by security holders, to the extent permitted by the revenue acts. (See *Southwest Consolidated case*, Br. 14, fn. 8). It may be assumed that the reorganization of an insolvent corporation would give rise more frequently to individual losses than gains.

to the benefit of Section 112 (b) (5) on the theory that the transaction constituted a transfer of the *corporate assets* by the *bondholders* in exchange for the new securities. There are two ready answers.

In the first place, the theory is premised upon a distortion of the facts. The transfer of the assets was made, as we have shown, by the reorganization trustee, the debtor corporations, and the indenture trustee, acting pursuant to court order. The bondholders had nothing to do with it.

In the second place, the result would be directly inconsistent with *Helvering v. Southwest Consolidated Corp.*, *supra*. If Section 112 (b) (5) applied in this manner, then, by virtue of Section 113 (a) (8), the new company in that case would have been entitled to the basis of the assets in the hands of the bondholders as transferors. The Court held, however, that the basis would be cost. Moreover, in view of the parallel between Clause C and Section 112' (b) (5), a decision that Section 112 (b) (5) applied, although Clause C of Section 112 (g) (1) did not, would require a frivolous distinction; namely, that while the bondholders were not stockholders under Clause C, they are transferors under Section 112 (b) (5). If this distinction were drawn, the decision in the *Southwest consolidated* case would be pointless and meaningless.

## CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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APRIL, 1942.



## APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

### SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*— \* \* \*

(3) *STOCK FOR STOCK ON REORGANIZATION.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *SAME—GAIN OF CORPORATION.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) *TRANSFER TO CORPORATION CONTROLLED BY TRANSFEROR.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities of such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of

the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

\* \* \* \* \*

(g) *Definition of Reorganization.*—As used in this section and section 113—

(1) The term “reorganization” means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however, effected.

(2) The term “a party to a reorganization” includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

\* \* \* \* \*

(h) *Definition of Control.*—As used in this section the term “control” means the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

\* \* \* \* \*

SEC. 113 [as amended by Section 807 of the Revenue Act of 1938, c. 289, 52 Stat. 447].

**ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.**

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

(6) **TAX-FREE EXCHANGES GENERALLY.**—If the property was acquired, after February 28, 1913, upon an exchange described in section 112 (b) to (e), inclusive, the basis (except as provided in paragraph (15) of this subsection) shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112 (b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

(7) **TRANSFERS TO CORPORATION.**—If the property was acquired—

(A) after December 31, 1917, and in a taxable year beginning before January 1,

1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

(8) **PROPERTY ACQUIRED BY ISSUANCE OF STOCK OR AS PAID-IN SURPLUS.**—If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

\*     \*     \*     \*

Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as added by Act of June 7, 1934, c. 424, 48 Stat. 911:

SEC. 77B. CORPORATE REORGANIZATIONS.—\* \* \*

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise; \* \* \* (9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation or to other corporations, or the consolidation of the properties of the debtor with those of another corporation, or the merger or consolidation of the debtor into or with another corporation or corporations, or the retention of the property by the debtor, the distribution of assets among creditors or any class thereof, the satisfaction or modification of liens, indentures, or other similar instruments, the curing or waiver of defaults, extension of maturity dates of outstanding securities, the change in interest rates and other terms of such securities, the amendment of the charter of the debtor, and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; (10) may deal with all or any part



of the property of the debtor and may include any other appropriate provisions not inconsistent with this section. \* \* \*

(h) Upon final confirmation of the plan, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge, and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the debtor or the other corporation or corporations provided for by the plan, or, if no trustee has been appointed, when retained by the debtor pursuant to the plan or transferred by it to the other corporation or corporations provided for by the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the court may direct the trustee or trustees, or if there be no trustee, the debtor and any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may direct the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Such final decree shall discharge the debtor from its debts and

liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid. \* \* \* (U. S. C., Title 11, Sec. 207.)

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 112 (b) (5)-1. *Transfer of property to corporation controlled by transferor.*—As used in section 112 (b) (5), the phrase “one or more persons” includes individuals, trusts or estates, partnerships and corporations (see section 1001); and to be in “control” of the transferee corporation such person or persons must own immediately after the transfer at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of such corporation. (See section 112 (h).) The phrase “immediately after the exchange” does not necessarily require simultaneous exchanges by two or more persons, but comprehends a situation where the rights of the parties have been previously defined and the execution of the agreement proceeds with an expedition consistent with orderly procedure.

*Example 1:* A owns certain real estate which cost him \$50,000 in 1920, but which has a fair market value of \$150,000 in 1936. He transfers this property to the M Corporation, a newly formed company, for all the latter's capital stock. No gain or loss is recognized from the transaction.

*Example 2:* C owns a patent right worth \$25,000 and D owns a manufacturing plant, worth \$75,000. C and D organize the R cor-

poration with an authorized capital stock of \$100,000. C transfers his patent right to the R Corporation for \$25,000 of its stock and D transfers his plant to the new corporation for \$75,000 of its stock. No gain or loss to C or D is recognized.

*Example 3:* B owns certain real estate which cost him \$50,000 in 1920, but which has a fair market value of \$200,000 in 1936. He transfers the property to the N Corporation in 1936 for 78 percent of all classes of stock of the corporation, the remaining 22 percent of the stock of the corporation having been issued by the corporation in 1933 to other persons for cash. B realizes a taxable gain of \$150,000 on this transaction. (See section 112 (h).)

ART. 112 (b) (5)-2. *Records to be kept and information to be filed.*—Every person who receives the stock or securities of a controlled corporation for property under section 112 (b) (5) shall file with his income tax return for the taxable year in which the exchange takes place a complete statement of all facts pertinent to the nonrecognition of gain or loss upon such exchange, including—

1. A description of the property transferred, or of his interest in such property, together with a statement of the cost or other basis thereof, adjusted to the date of the transfer, and

2. A statement of the amount of stock or securities and other property or money received in the exchange. The amount of each kind of stock or securities and other property received shall be set forth at its fair market value at the date of the exchange.

Every such controlled corporation shall

file with its income tax return for the taxable year in which the exchange takes place:

(1) A full description of all property received from the transferors, together with a statement of the cost or other basis thereof in the hands of the transferors adjusted to the date of the transfer, and

(2) A statement of the amount of stock or securities and other property or money which passed to the transferors in the transaction, together with a full statement of the amount of the issued and outstanding stock and securities of such controlled corporation immediately after the exchange and of the ownership of each transferor of each class of stock of such controlled corporation immediately after the exchange (showing as to each class the number of shares and percentage owned and the voting power of each share).

Permanent records in substantial form shall be kept by every taxpayer who participates in a tax-free exchange under section 112 (b) (5) showing the cost or other basis in his hands of the transferred property, and of the amount of stock or securities and other property or money received, in order to facilitate the determination of gain or loss from a subsequent disposition of such stock or securities and other property received in the exchange.





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**No. 644**

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***In the Supreme Court of the United States***

**OCTOBER TERM, 1941**

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**GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,  
PETITIONER,**

**v.**

**CEMENT INVESTORS, INC., RESPONDENT.**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.**

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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**In the Supreme Court of the United States**

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,  
PETITIONER;

v.

CEMENT INVESTORS, INC., RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

The Respondent taxpayer opposes the granting of the Petition for Writ of Certiorari herein and prays that the Writ be denied.

**OPINIONS BELOW.**

The memorandum opinion of the United States Board of Tax Appeals (R. 13-22) is unpublished. The opinion of the Circuit Court of Appeals (R. 194-200) is reported in 122 F. 2d 380.

**JURISDICTION.**

The judgment of the Circuit Court of Appeals was entered July 24, 1941 (R. 200). The Government has invoked the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The Respondent taxpayer urges this Court not to assume jurisdiction, in that the case is not a proper one for review on Writ of Certiorari under Rule 38 of this Court.

### QUESTION PRESENTED.

Where a taxpayer exchanged defaulted bonds of The Colorado Industrial Company, guaranteed by The Colorado Fuel and Iron Company, and the equities represented thereby, for bonds and stock of a new company, The Colorado Fuel and Iron Corporation, which acquired all of the assets of the predecessor companies, and immediately after such exchange the taxpayer and the other former bondholders of The Colorado Industrial Company owned all of the outstanding stock of the new company, was taxable gain realized? The Circuit Court of Appeals for the Tenth Circuit unanimously held that no gain was realized, because the exchange came within the provisions of Section 112 (b) (5) of the Revenue Act of 1936 (R. 197-199, 200). Two of the three judges before whom the case was argued held, moreover, that the transaction was nontaxable as a "reorganization" under Sections 112 (b) (3) and 112 (g) (1) of the Revenue Act of 1936 (R. 199-200).

### REASONS FOR DENYING THE WRIT.

The Petition for Writ of Certiorari has distorted the holding of the Court below. It asserts (P. 2, 6) that the primary holding of the Court below concerned "reorganization", and urges this Court to assume jurisdiction because of a conflict between the circuits on this issue. On the contrary, the holding of the Court below was not based on the question of "reorganization". No essential conflict exists between the decision in this case and any decisions in other circuits.

The Tenth Circuit Court of Appeals in the case at bar held that the exchange by the Taxpayer of bonds of The Colorado Industrial Company for income bonds and stock in the new Colorado Fuel and Iron Corporation was a nontaxable transaction under the terms of Section 112 (b) (5)

of the Revenue Act of 1936<sup>1</sup> (R. 197-199). That Section provides that no gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities and immediately after the exchange such person or persons are in control of the corporation. The Court held that under the findings of the District Court in the reorganization proceedings, the Industrial bondholders had acquired all the equity in the old Colorado Fuel and Iron Company prior to the date of exchange; that, therefore, "in substance, Industrial's bondholders were the transferors" (R. 198). It held further that "the bonds of Industrial were property in the hands of the holders thereof and they were transferred to the Colorado Corporation in exchange for all of the voting stock thereof." (R. 198) "Hence", the Court concluded, "property was transferred to the Colorado Corporation solely in exchange for stock and securities of such corporation and immediately after the transfer the bondholders, the transferors, were in control of the Colorado Corporation, owning all of its stock, and no gain or loss should be recognized by reason of the provisions of §112 (b) (5)". (R. 198-199)

Such holding that no gain was realized by virtue of the provisions of Section 112 (b) (5) was unanimous, for Judge Huxman concurred specially in it (R. 200). Such holding is entirely independent of the question of "reorganization". As the Court said, "Under §112 (b) (5), a reorganization is not an essential element".<sup>2</sup> (R. 198) The

<sup>1</sup> "Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange."

<sup>2</sup> *Portland Oil Company v. Commissioner*, (C. C. A. 1), 109 F. 2d 479, 489, certiorari denied 310 U. S. 650; *Hartford-Empire Company v. Commissioner*, 43 B. T. A. No. 20; *Leckie v. Commissioner*, 37 B. T. A. 252, 257; *Handbird Holding Corporation v. Commissioner*, 32 B. T. A. 238, 247.



LeTulle case<sup>3</sup>, which concerned an asserted reorganization, has no bearing whatsoever on this issue, and this issue involves no conflict with any other circuit.<sup>4</sup>

The decision under Section 112 (b) (5), moreover, involves no question of general importance justifying certiorari by the Supreme Court of the United States. Indeed, on the basis of the Government's efforts below it can hardly be said to raise any question at all. The language of Section 112 (b) (5) has occurred in all revenue acts since 1924. In the briefs below the Counsel for Commissioner have cited no cases whatsoever holding it inapplicable to a transaction of this kind. Nor has the Government advanced any argument on the point other than categorical statements. Counsel even failed to file a reply brief with argument and authority on this question when the Circuit Court granted it special leave to do so. (R. 194) Nor has Respondent discovered any cases holding Section 112 (b) (5) inapplicable to a transaction of this sort. On the other hand, the position of the Circuit Court of Appeals for the Tenth Circuit in the proceedings below was supported by the following authorities: *Léckie v. Commissioner*, 37 B. T. A. 252, 257; *Rockford Brick & Tile Co. v. Commissioner*, 31 B. T. A. 537; *Miller & Paine v. Commissioner*, 42 B. T. A. 586; *Portland Oil Company v. Commissioner*, (C. C. A. 1) 109 F. 2d 479, 488, certiorari denied 310 U. S. 650; *P. A. Birren & Son v. Commissioner*, (C. C. A. 7) 116 F. 2d 718, 719.

The holding below on which the Government bases its Petition for Certiorari, that the transaction also constituted a reorganization, was secondary, unnecessary and immaterial. The Supreme Court of the United States could resolve this question either way without affecting the decision of this case.

<sup>3</sup> *LeTulle v. Scofield*, 308 U. S. 415.

<sup>4</sup> The only other circuit court decisions which Respondent has discovered on the question, *Portland Oil Company v. Commissioner*, (C. C. A. 1) 109 F. 2d 479, certiorari denied 310 U. S. 650 and *P. A. Birren & Son v. Commissioner*, (C. C. A. 7) 116 F. 2d 718; held in accord with the case at bar that the transfer of intangibles (in one case an installment contract and in the other accounts receivable) to a corporation in exchange for its stock was covered by Section 112 (b) (5).

**CONCLUSION.**

It is, therefore, respectfully submitted that the Government's Petition for Certiorari should be denied.

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No. 644

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*In the Supreme Court of the United States*

OCTOBER TERM, 1941

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,  
PETITIONER,

v.

CEMENT INVESTORS, INC., RESPONDENT.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT.

---

**BRIEF FOR THE RESPONDENT**

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**In the Supreme Court of the United States**

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**CEMENT INVESTORS, INC., RESPONDENT.**

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OF APPEALS FOR THE TENTH CIRCUIT.**

**BRIEF FOR THE RESPONDENT**

**OPINIONS BELOW.**

The opinion of the United States Board of Tax Appeals (R. 13-22) is unpublished. The opinion of the Circuit Court of Appeals (R. 194-200) is reported in 122 F. (2d) 380.

**JURISDICTION.**

The judgment of the Circuit Court of Appeals was entered July 24, 1941 (R. 200-201). Petitioner filed Petition for Writ of Certiorari on September 23, 1941. The Supreme Court denied certiorari on February 9, 1942. The Commissioner then filed petition for rehearing on February 28,

1942. This petition was granted on March 9, 1942. The Commissioner has invoked the jurisdiction of this court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED.

Where a taxpayer exchanged defaulted bonds and the equities represented thereby for bonds and stock of a new company, which acquired all the assets of the insolvent predecessor, and immediately after such exchange the taxpayer and the other former bondholders owned all the outstanding stock of the new company, was taxable gain realized?

Sections 112 (b) (5), 112 (b) ~~43~~ and 112 (g) of the Revenue Act of 1936 are determinative of this question.

### STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the Appendix, infra, pages 23-26.

### STATEMENT.

Respondent has nothing to add to Petitioner's Statement of Facts.

### SUMMARY OF ARGUMENT.

This case falls squarely within the terms of Section 112 (b) (5), for property was transferred to a new corporation in exchange for stock control. It was so held by the Court below in accordance with the unanimous authority of the only cases in point which have been cited. The bonds and the claims and equities represented thereby were property within the meaning of the statute. They were transferred to the new corporation and for its benefit. The bondholders received in exchange stock control.

The Circuit Court of Appeals for the Tenth Circuit unanimously held that no gain was realized in this case

because the exchange came within the provisions of Section 112 (b) (5). Two of the Judges on that Court, moreover, held that the transaction was nontaxable as a reorganization under Sections 112 (b) (3) and 112 (g) (1) (C).

The conclusion that the transaction involved no gain under Section 112 (b) (5) was completely in harmony with the case of *Helvering v. Southwest Consolidated Corporation*, No. 286, and the other three reorganization cases decided February 2, 1942. Section 112 (b) (5) was not involved in any of those cases, but they did establish the principle that in this type of transaction the bondholders are the real parties in interest and that the mechanics of consummation are not material.

It is admitted, however, that under the decision in the *Southwest Consolidated Corporation* case, supra, the secondary holding of the court below that the bondholders had become stockholders, thus creating a nontaxable reorganization under Section 112 (b) (3), is no longer tenable.

### ARGUMENT.

#### I.

THE PROVISIONS OF SECTION 112 (b) (5) OF THE REVENUE ACT OF 1936 PRECLUDE THE RECOGNITION OF GAIN OR LOSS IN THIS TRANSACTION.

1. Section 112 (b) (5) of the Revenue Act of 1936 provides that no gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; and further that in the case of an exchange by two or more persons, the amount of stock or securities received by each must be substantially in proportion to his interest in the property prior to the exchange. As was stated in the opinion of the Circuit Court of Appeals below (R. 197-199):

"The elements which constitute a nontaxable exchange under § 112 (b) (5) are that

- (a) Property
- (b) Be transferred to a corporation.
- (c) Solely in exchange for stock or securities in such corporation, and that
- (d) The transferors immediately after the exchange be in control of the corporation, through ownership of 80 percent of all voting stock and at least 80 percent of all other classes of stock of the corporation.

Under § 112 (b) (5), a reorganization is not an essential element.

Both Industrial and the Colorado Company, as guarantor, had defaulted in the payment of the interest and principal of Industrial's bonds. The defaults had not been cured, and neither Industrial nor the Colorado Company was able to cure them. *There was no equity in the properties over and above the bonded debts secured by Industrial's mortgage and the Colorado Company's mortgage.* The holders of Industrial's bonds were entitled to a satisfaction of their indebtedness from the mortgaged property, or a statutory substitute therefor under § 77B. *They had acquired equitable rights in the property* and were entitled to have it disposed of under a plan, fair and equitable to them. On the approval of the petitions under § 77B, the property of Industrial and the Colorado Company came under the jurisdiction of the bankruptcy court and private rights in respect to the res became subject to the superior dominion of the court and were to be adjudicated pursuant to the standards prescribed in § 77B. Since no equity remained in the properties for the preferred and common stockholders, the properties passed under the jurisdiction of the court empowered to make fair and equitable disposition thereof for the benefit of the bondholders. *In the exercise of that jurisdiction the bankruptcy court ordered the equitable rights and interests of the bondholders in the properties to be transferred to the Colorado Corporation in exchange for stock and bonds of that corporation.* Pursuant to the order, all of the assets of Industrial and the



Colorado Company were transferred to the Colorado Corporation. *In substance, Industrial's bondholders were the transferors.*

*Furthermore, the bonds of Industrial were property in the hands of the holders thereof and they were transferred to the Colorado Corporation in exchange for all of the voting stock thereof, and under the plan no additional stock was to be presently issued. The warrants gave no rights to the holders thereof to vote or otherwise exercise the rights of stockholders.*

Hence, property was transferred to the Colorado Corporation solely in exchange for stock and securities of such corporation and immediately after the transfer the bondholders, the transferors, were in control of the Colorado Corporation, owning all of its stock, and no gain or loss should be recognized by reason of the provisions of Sec. 112 (b) (5)." (Italics ours.)

The Petitioner cites no authority to overcome the logic and common sense of this opinion—in fact before the Board and the Court below, he dismissed the whole issue of Section 112 (b) (5) without so much as an argument. Now, finally forced to the wall, he counters with inapplicable analogies, weak weapons to face the plain meaning of the statute and a sound, unanimous decision of the Circuit Court of Appeals. That opinion, in turn, was not unique. The following decisions are all directly in point. They constitute not the weight of authority, but unanimous authority:

In *Leckie v. Commissioner*, 37 B. T. A. 252, petitioner owned bonds of the Morgan Properties Company, whose assets were foreclosed and transferred to a new company, Industrial Properties, Inc. Through a protective committee the bondholders received stock in the new company in exchange for the bonds. In holding this a nontaxable exchange, the Board said (page 257):

" . . . Section 112 (b) (5) is clearly applicable and under it no finding need be made that there was a reorganization. . . . Petitioner and a majority

of the bondholders, in 1933, transferred their bonds to the committee; but they remained the equitable owners of them. When, in 1934, the committee transferred the property and bonds held by it in trust for the bondholders, to the new corporation in exchange for all its stock, the committee held such stock as trustees for the bondholders and they, through their trustees, were in control of the new corporation. The plan contemplated that the stock of the new corporation would be distributed or exchanged . . . pro rata among the depositing bondholders', and this was subsequently carried out. It seems clear, therefore, that the exchange in 1934 came squarely within section 112 (b) (5) and hence no gain or loss is to be recognized."

Again, in *Rockford Brick & Tile Co. v. Commissioner*, 31 B. T. A. 537, creditors of an insolvent concern assigned their claims to a creditors committee, which organized a new corporation to which the insolvent corporation transferred certain assets in exchange for the stock of the new corporation, which was distributed to the assigning creditors. The Board held that no gain or loss should be recognized, in view of the provisions of Section 112 (b) (5) (page 540):

"In the instant case, the creditors of the Albert Lea Farms Co. turned over their claims to the creditors' committee. The creditors' committee organized the new corporation, the Hollandale Farms, Inc., and distributed stock in that company to the creditors in proportion to their claims. This brought the transaction clearly within the provisions of section 112 (b) (5) and the creditors, through the committee, were immediately in control of the corporation on account of their ownership of all its capital stock. This constituted an exchange of the creditors' claims (petitioner being one of them), against the Albert Lea Farms Co. for stock in the Hollandale Farms, Inc., and no gain or loss resulted by reason of this transaction."

In *Miller & Paine v. Commissioner*, 42 B. T. A. 586, creditors of a New Jersey corporation which had conveyed all of its assets to a New York corporation, received shares

of stock in the New York corporation in exchange for their indebtedness. The Board again held that no gain or loss was realized, by reason of the provisions of Section 112 (b) (5).

In the recent case of *Reed v. Commissioner*, 45 B. T. A. No. 173, the same conclusion was reached where creditors released their claims against an insolvent corporation and, through a complicated series of exchanges, came out with the controlling stock interest in a new corporation. Speaking of the complicity of the maneuvers, and the fact that the exchange was not directly one of notes in the old corporation for stock in the new corporation, the Board stated (p. 7):

“ . . . However, the petitioners insist that no such exchange was accomplished because the notes were not transferred to Sutherland. The facts show that the Investment notes were exchanged for the Miller notes, which in turn were delivered to the depository for the noteholders' committee. The depository was instructed to deliver the Miller notes as Sutherland might direct. Sutherland directed the delivery to the trustee of the Miller mortgage. From the trustee, Sutherland received a release of that mortgage, thereby becoming the owner of the property free from any lien. The result was exactly the same as if the Investment notes had been transferred to Sutherland. *We fail to perceive any reason why the transaction should not be viewed as a whole and held to be an exchange, even though neither the Investment notes nor the Miller notes were directly exchanged for the stock of Sutherland. Cf. Rockford Brick & Tile Co., 31 B. T. A. 537. . . . We hold that it was an exchange within the meaning of section 112 (b) (5), Revenue Act of 1936, and that no loss can be recognized.*” (Italics ours.)

A similar holding is necessarily implied in an analogous line of cases, where the transferee corporation endeavored to step up the value of intangible assets acquired to the market value at the time of acquisition. Such step-up of the

intangibles themselves is not permissible if the transaction falls within the provisions of Section 112 (b) (5). Section 113 (a) (8).

Thus, in *Portland Oil Co. v. Commissioner*, (C. C. A. 1) 109 F. (2d) 479, an installment contract was transferred to a corporation in exchange for its stock by one party and cash was delivered for the balance of the stock by other parties. The corporation contended that it was entitled to a cost basis on the installment contract represented by its fair market value at the date of the transfer, but the Court held otherwise; applying Section 112 (b) (5) to the transaction. The court discusses this section at some length, pointing out that it is applicable "in the absence of a corporate reorganization" (page 489) and stating the purpose of this section in the following language (page 488):

"It is the purpose of Section 112 (b) (5) to save the taxpayer from an immediate recognition of a gain, or to intermit the claim of a loss, in certain transactions where gain or loss may have accrued in a constitutional sense, but where in a popular and economic sense there has been a mere change in the form of ownership and the taxpayer has not really 'cashed in' on the theoretical gain, or closed out a losing venture."

Again, in *Birren & Son v. Commissioner*, (C. C. A. 7) 116 F. (2d) 718, the transferee corporation acquired an undertaking business, including accounts receivable, in exchange for 98% of its stock. The Court held that so far as the tax basis of the accounts receivable was concerned, the transferee stepped into the shoes of the transferor, since no gain was recognized to the transferor under the provisions of Section 112 (b) (5).

To the same effect is *Meagher v. Commissioner*, 20 B. T. A. 68, where installment obligations were conveyed to a corporation in exchange for its capital stock.

Thus, there are cases in which bonds, unsecured claims, installment contracts and accounts receivable were trans-

ferred to corporations in exchange for stock and no gain or loss was recognized under Section 112 (b) (5) or the corresponding section of previous laws. It is significant that counsel for the Petitioner cites not one single case in direct support of the contention that Section 112 (b) (5) does not apply. Nor have counsel for the Respondent been able to find any case supporting Petitioner's contention.

It is submitted, therefore, that under all of the authorities the elements which constitute a nontaxable transfer under Section 112 (b) (5) are present in this case.

2. Counsel for Petitioner contend that *Helvering v. Southwest Consolidated Corporation*, No. 286, decided February 2, 1942, governs the decision in this case. That case, however, involved the basis of the corporate assets in the hands of the transferee and not, as here, the taxability of the exchange to the transferor. There "reorganization" was the primary issue involved. Here the primary issue is the applicability of Section 112 (b) (5), which is entirely independent of, and does not require, "reorganization". Section 112 (b) (5) was not involved in the *Southwest Consolidated* case, and could not be applied, since nonparticipating bondholders were paid off in cash.

It may be noted that counsel for Petitioner conclude this argument on the applicability of the *Southwest Consolidated* case with the statement that "the real issue before the Court is whether recognition of gain or loss upon the exchange may nevertheless be avoided under Section 112 (b) (5)". (B. 14).

3. The Petitioner then asserts that under Section 112 (b) (5) the Industrial bondholders did not transfer any property to the new corporation.

The bonds of the Industrial Company were property within the meaning of this section; so were the claims represented by those bonds; so were the equities represented thereby in the assets of the old corporation. In fact, the



bonds represented the only value in those assets, since the equity of the stockholders in the old company had disappeared. Disregarding the technicalities and the shell of legal title, the bondholders were the equitable owners of the properties of the old corporation. As stated by the Circuit Court of Appeals "In substance, Industrial's bondholders were the transferors". (R. 198).

If the Industrial bondholders transferred nothing to the new corporation, then there was no consideration for the issuance of the new securities to them. These bondholders received all of the stock and bonds issued by the new corporation, so that in substance they must have transferred property to the new corporation, or they would not be entitled to the securities which they received in exchange.

As stated in the Plan of Reorganization, approved by the District Court:

"The Plan gives to the holders of the Industrial Bonds the entire ownership and control of the new company." (R. 70).

Suppose, for instance, A owns real estate worth \$20,000.00, subject to a mortgage of \$10,000.00 owned by B. They both transfer their rights to a corporation, taking its stock in exchange equally. The transaction would be non-taxable under Section 112 (b) (5); yet the property transferred by B remains an asset in the hands of the corporation only in the sense that it does in the case at bar. B's contribution represents a half interest in the property transferred; it relieves the corporation of a lien against the property transferred by A. B's contribution inures to the corporation's benefit, just as clearly as A's. If, in the foregoing illustration, it should be assumed that B's mortgage amounted to \$20,000.00, and that he received all the stock, the situation would be identical with the case at bar.

The opinion of Mr. Justice Douglas in the case of *Alabama Asphaltic Limestone Company v. Commissioner*, No. 328, decided February 2, 1942, stated in part as follows:

“ . . . When the equity owners are excluded and the old creditors become the stockholders of the new corporation, it conforms to realities to date their equity ownership from the time when they invoked the processes of the law to enforce their rights of full priority. At that time they stepped into the shoes of the old stockholders. The sale ‘did nothing but recognize officially what had before been true in fact.’ *Helvering v. New Haven & S. L. R. Co.*, (C. C. A. 2d) 121 F. (2d) 985, 987.”

To the same effect are: *Mascot Stove Co. v. Commissioner*, (C. C. A. 6) 120 F. (2d) 153, certiorari denied February 2, 1942; *D. W. Klein Co. v. Commissioner*, (C. C. A. 7) 123 F. (2d) 871; *Templeton's, Jewelers, Inc. v. U. S.*, (C. C. A. 6) decided March 4, 1942, not officially reported, but reported in Prentice-Hall 1942, Par. 62,527; *Helvering v. New Haven & S. L. R. Co., Inc.*, (C. C. A. 2) 121 F. (2d) 985. In the last case, Mr. Justice L. Hand's opinion describes the essence of the matter as follows (P. 987):

“ . . . as soon as the debtor becomes irrevocably insolvent and the debts are due; the creditors are then entitled to control the property, and thereafter its adventures are their own. The debtor loses any rightful power to dispose of it except for an adequate price, and courts like to speak of him as a ‘trustee’; all that is necessary to make them complete legal owners is that they shall follow the prescribed legal formalities. The purpose of such statutes as Sec. 112 was to make mere formal changes immaterial either for gain or loss; if the taxpayer's succeeding interest was for practical purposes the same, the Act wished to treat any change of value as ‘unrealized’ in accordance with the underlying presupposition of the income tax throughout, that variations in the value of property are negligible unless they take form in some substantially new interest. The changes in the case at bar were not of that kind; the bondholders were as much the owners before foreclosure as after; the decree and the sale did nothing but recognize officially what had before been true in fact.” (Italics ours.)

The statute does not limit the broad all-inclusive word "property"—in fact the legislative history of the section indicates that Congress intended it in its broadest meaning. Thus the Acts of 1921 and 1924 alternated the use of the word "property" in this connection with the phrase "property real, personal or mixed", substituting one for the other as merely "clerical" or "minor" changes. Revenue Act of 1921, Section 202 (c) (3); Revenue Act of 1924, Section 203 (b) (4); Report Conference Committee (67th Cong., 1st Sess., H. Rept. 486, p. 18); Report Ways and Means Committee (68th Cong., 1st Sess., H. Rept. 179, p. 13). The phrase "property real, personal or mixed" is, of course, as broad a term as occurs in the ordinary vocabulary.

Similarly, in connection with the Revenue Act of 1928, Congress struck from the basis provision corresponding to Section 113 (a) (8) a parenthetical clause excepting "stock or securities in a corporation a party to a reorganization" from the carry-over basis of property received in a transaction covered by the section corresponding to 112 (b) (5). The report of the Ways and Means Committee (70th Cong. 1st Sess., H. Rept. 2, pp. 18-19) cites the case of the transfer of stock by a taxpayer to a corporation in exchange for its stock as non-taxable under the section corresponding to 112 (b) (5). Since the Act used the term "securities" obviously bonds would fall in the same category.

As Mr. Justice Butler stated in *Fidelity and Deposit Company of Maryland v. Arenz*, 290 U. S. 66, 68:

" 'Property' is a word of very broad meaning and when used without qualification, expressly made or plainly implied, it reasonably may be construed to include obligations, rights and other intangibles as well as physical things."

Again, in *Helvering v. Gambrill*, 313 U. S. 11, 15, Mr. Justice Douglas said:

" . . . 'property held by the taxpayer' as used in Sec. 101 (c) (8) embraces not only full ownership but also any interest whether vested, contingent, or conditional."

In *De Ganay v. Lederer*, 250 U. S. 376, 381, Mr. Justice Day holding that the physical evidence of intangibles, the bonds, notes and mortgages themselves, constituted property, stated:

"To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages and certificates of stock are regarded as property. By state and Federal statutes they are often treated as property not as mere evidences of the interest which they represent."

In *Superior Bath House Co. v. McCarroll*, 312 U. S. 176, 179, Mr. Justice Black holding that the term "property" included the income from the use of property, said:

" . . . the word property is by no means limited in all its variations, to actual tangible physical things."

The cases cited under Section 1 of Part I hereof, of course all held that bonds and other intangibles constituted "property" under the very statute in question; and in the cases of *Leckie v. Commissioner*, supra, *Rockford Brick & Tile Co. v. Commissioner*, supra, *Miller & Paine v. Commissioner*, supra, and *Reed v. Commissioner*, supra, claims against the old corporation were extinguished in the exchange and did not survive as assets in the hands of the transferee. It is significant that Petitioner is unable to cite a case in support of his "survival" theory.

4. Petitioner, in Section 2 under Part II of his Brief, is apparently endeavoring to establish the point that the new corporation acquired the physical assets involved as a transaction entirely independent from the exchange of Industrial Bonds for the securities of the new corporation, and that these transactions had no relation to each other.

It is admitted, however, on the authority of *Helvering v. Southwest Consolidated Corporation*, supra, that "the

transaction must be considered as a whole" (B. 21), and the Court Order of June 20, 1936, directing the transfer of the assets and the issuance and distribution of the new securities, stated that the provisions thereof should be a single and entire order and direction:

"The provisions of this Order directing the transfer and delivery of the properties and assets of the Debtors to the New Company, . . . and the issue by the New Company to or on the order of, and the distribution by, the Reorganization Managers of the New Securities, shall be a single and entire order and direction, notwithstanding the provisions hereof permitting the transfer of said properties and assets forthwith and without awaiting . . . the issue, delivery and distribution of the New Securities." (R. 136.)

Obviously, the claims of the Industrial bondholders could not be disposed of until their bonds were exchanged for the new securities and until this was accomplished, the physical assets were not free and clear in the hands of the new company. The Reorganization Managers were only agents. Logically, from every viewpoint, as the Court ordered, the various transfers involved were but a single transaction, the consummation of which simultaneously was practicably impossible of accomplishment.

Actually the only parties who had anything of value to transfer were the Industrial bondholders. The new corporation was the recipient, the only party on the other side of the transaction that benefited from the transfer. This is the substance of the matter, and this Court is not concerned with the mechanics.

*Alabama Asphaltic Limestone Co. v. Commissioner*, No. 328; *Palm Springs Holding Co. v. Commissioner*, No. 503; and *Bondholders Committee v. Commissioner*, Nos. 128, 129, decided February 2, 1942; *Labrot v. Burnet*, (C. A. D. C.) 57 F. (2d) 413; *Snowden v. McCabe*, (C. C. A. 6) 111 F. (2d) 743.



The Commissioner's attempt to "atomize the plan" is uncalled for here (*Helvering v. New Haven and S. L. R. Co.*, (C. C. A. 2) 121 F. (2d) 985, 988); and the analysis is contrary to fact.

5. Petitioner, in Section 3 under Part II of his Brief, cites a number of cases involving payment of a debt by the debtor itself, but not involving extinguishment of the debt by the exchange for securities of a third party. Petitioner contends that since these cases hold that no "sale or exchange" is involved where the debt is paid by the debtor, then no "sale or exchange" is involved here, and, consequently, there is no transfer of property.

The cases cited, *Fairbanks v. United States*, 306 U. S. 436, and the line of cases beginning with *Bingham v. Commissioner* (C. C. A. 2), 105 F. (2d) 971, all relate to "sale or exchange" transactions within the capital gain and loss provisions of the applicable Revenue Acts. Such contention is not in point here, because the statutory word under Section 112 (b) (5) is "transfer", not "sale or exchange".

See *Helvering v. Flaccus Leather Co.*, 313 U. S. 247.

Furthermore, *Fairbanks v. United States* arose under the Revenue Acts of 1926 and 1928, before the 1934 amendment making the retirement of bonds equivalent to the exchange of property. This amendment, embodied in Section 117 (f) of the Act of 1936, provides:

"RETIREMENT OF BONDS, ETC.—For the purposes of this title, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness . . . shall be considered as amounts received in exchange therefor."

Thus, even if it is conceded that the transaction here under consideration constituted a surrender for cancellation or a retirement, it is still an exchange by statutory definition.

See *McClain v. Commissioner*, 311 U. S. 527.

Nor are the cases following *Bingham v. Commissioner*, supra, in point. The distinction between the situation there involved and that involved in this case is demonstrated by the following language of the Board of Tax Appeals in the case of *Miller & Paine v. Commissioner*, 42 B. T. A. 586, 593:

"Among other authorities which petitioner cites in support of its contention are *Hale v. Helvering*, 85 Fed. (2d) 819, affirming 32 B. T. A. 356, and *Bingham v. Commissioner*, 105 Fed. (2d) 971. We think these authorities do not support petitioner's contention. In the *Hale* case there was a compromise by the creditor of his debt for less than face value and the court held that this action of the creditor in accepting in cash a lesser amount than the full face value of his note was not a 'sale or exchange' of his note, so as to bring the loss suffered by the creditor within the capital loss provisions of the statute. To somewhat the same effect is the *Bingham* case above cited.

"If there had been a paying off of petitioner's debt in cash at 10 cents on the dollar, doubtless petitioner would be correct in its contentions under the authorities cited. \* \* \*

"In the instant case there can be no question but that the creditors of the New Jersey corporation, including petitioner, transferred their notes against that corporation to the New York corporation and received in exchange therefor solely stock in the New York corporation. *In other words, they did not receive payment of their debts, but exchanged their debts for a continuing interest in the new corporation.*" (Italics ours).

The distinction is also brought out by the Board of Tax Appeals in *Bowen v. Commissioner*, 37 B. T. A. 412, 417 and *Shuster v. Commissioner*, 42 B. T. A. 255, 259.

"Like the term 'property', the term 'transfer' is all inclusive. As Mr. Justice Stone stated in *Raybestos-Manhattan, Inc. v. United States*, 296 U. S., 60, 62-63:

"While the statute speaks of transfers, it does not require that the transfer shall be directly from the hand of the transferor to that of the transferee. It is enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another."

To demonstrate the fallacy of Petitioner's argument on this point, it is only necessary to refer to the Stipulation of Facts, the Plan of Reorganization, the letter of deficiency, the Petitions for Certiorari and Rehearing and his Brief, wherein this transaction is described repeatedly as a "transfer" of property to the corporation or an "exchange" of securities by the bondholders.

In the original determination of deficiency, the Commissioner found that Respondent realized income from an exchange of securities. (R. 8, 9).

The Commissioner's entire case has been based on the assertion that this transaction constituted an exchange of securities giving rise to taxable income under Sections 111, 112 and 117 of the Revenue Act of 1936. If no transfer or exchange of property was involved, no taxable income can result under these sections and the Commissioner is relegated to Section 22 (a) of the Revenue Act, which has never been urged at any stage of this proceeding. He may not now switch to this other section and on a new theory attempt to overthrow the decisions below.

*Helvering v. Wood*, 309 U. S. 344, 348-9.

*Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, 498.

6. Counsel for the Petitioner apparently make no argument with regard to the third, fourth and fifth requirements of Section 112 (b) (5) as set forth in the opinion of the Court below, namely: (3) that the exchange was solely for stock or securities in a new corporation; that (4) immediately after the exchange the transferors were in control of at least 80% of the outstanding stock of the new corporation, and that (5) if two or more persons are in-

volved the securities received by each must be substantially in proportion to his interest in the property prior to the exchange.

It is obvious that the first two requirements mentioned above have met with compliance.

On the last requirement the securities received by each Industrial bondholder were not merely "substantially in proportion to his interest in the property prior to the exchange", but the proportion was retained exactly. That was the whole purpose of the reorganization and the statute under which it was concluded. The Federal District Court found specifically in the reorganization proceedings that the Plan was fair and equitable and did not discriminate against any class of creditors or stockholders. (R. 33,126). The conclusion is, therefore, inevitable that the proportionate interest was retained.

7. Under Section 4 of Part II of his Brief counsel contend that in this case Section 112 (b) (5) has no application unless there is a "reorganization" within the definition of Section 112 (g). The only authority cited for this contention is *Helvering v. Southwest Consolidated Corporation*, supra, in which Section 112 (b) (5) was not involved and not even mentioned in the opinion.

Furthermore, an examination of Section 112 of the Act discloses that wherever Congress considered "reorganization" as a necessary element, it was specifically mentioned, and there is no reference whatsoever to "reorganization" in Paragraph 5.

Not only the opinion below but a number of other decisions have definitely held that reorganization is not a prerequisite to the application of Section 112 (b) (5).

Thus, in *Portland Oil Co. v. Commissioner* (C. C. A. 1), 109 F. (2d) 479, 488-9, the Court said:

" . . . we are satisfied that the facts fall within Section 113 (a) (8), in conjunction with Section 112

(b) (5). *These latter sections, though they overlap somewhat with Section 113.(a) (7), also apply to situations where there may be no technical corporate reorganization."* \* \* \*

*"But the answer is that we are not now concerned with the corporate reorganization provisions of the Act, \* \* \*. Section 112 (b) (5) may be applicable in the absence of a corporate reorganization".* (Italics ours).

The following cases also have held that a transaction may fall under Section 112(b) (5) though it fails to qualify under the reorganization provisions: *D. W. Klein Co. v. Commissioner*, (C. C. A. 7) 123 F. (2d) 871; *Skouras v. Commissioner*, 45 B. T. A. No. 159; *Royal Marcher v. Commissioner*, 32 B. T. A. 76; *Handbird Holding Co. v. Commissioner*, 32 B. T. A. 238, *Symington and Sons, Inc. v. Commissioner*, 35 B. T. A. 711, and the cases cited in Section 1 of Part I hereof.

No cases to the contrary are cited by the Petitioner.

8. In the footnote at the bottom of pages 26 and 27 of the Brief, Petitioner infers that it has been necessary for him to take an inconsistent position in other cases in order to protect the revenues, and then states:

*"It may be assumed that the reorganization of an insolvent corporation would give rise more frequently to individual losses than gain".*

Although not directly within the statutory definition of "reorganization", this case, from a practical standpoint, did involve the reorganization of an insolvent corporation and Respondent concurs in the conclusion stated by the Petitioner. If Section 112 (b) (5) had no application, most of the security holders of corporations reorganized under Section 77-B proceedings would incur taxable losses.

That Congress had just this in mind is shown by the following excerpt from a Committee Report. Act of 1921, Report of House Ways and Means Committee (67 Cong., 1st Sess., H. Rept. 350, p. 10):



"The bill (subdivision (d)<sup>1</sup>, p. 6) provides new and explicit rules for determining gain or loss where property is exchanged for other property. . . ."

"The preceding amendments, if adopted, will, by removing a source of grave uncertainty, not only permit business to go forward with the readjustments required by existing conditions but will also *considerably increase the revenue by preventing taxpayers from taking colorable losses in wash sales and other fictitious exchanges.* (Italics ours).

If the Commissioner should prevail in the argument that Section 112 (b) (5) is inapplicable unless there is a technical reorganization, artificial losses would be permitted. If he should prevail on the theory that this transaction was not an exchange, then the losses incurred would be ordinary losses deductible in full and not subject to the limitations placed by recent Revenue Acts on losses from the sale or exchange of capital assets. Internal Revenue Code, Section 117.

## II.

IF THE THEORY OF PETITIONER BE SOUND THEN RESPONDENT CONTENTS THAT THE TRANSACTION IN QUESTION CONSTITUTED A REORGANIZATION UNDER SECTION 112 (g) OF THE REVENUE ACT OF 1936 AND THAT THE TRANSACTION WAS NOT TAXABLE BY VIRTUE OF THE PROVISIONS OF SECTION 112 (b) (3).

1. Section 112 (g) (1) (C) provides that there is a "reorganization" in the case of "a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer *the transferor* or its stockholders or both are in control of the corporation to which the assets are transferred." (Italics ours).

By its decision in the *Southwest Consolidated Corporation* case, supra, this court has found that bondholders cannot become stockholders, but that case did not involve the question of whether the predecessor corporation was in control immediately after the transfer.

If the contention of Petitioner that the Industrial bondholders did not transfer property to the new corporation in this case should be found correct, then such bondholders were not entitled to the securities issued by the new corporation. If, as contended by the Petitioner, the real transferor in this case was the predecessor corporation which conveyed the physical assets to the new corporation, then technically and logically it was entitled to the securities issued by the new corporation and on this theory it would have been in control of the new corporation immediately after the transfer of such assets. Obviously, this is a distortion of the facts as they actually occurred, but the statement demonstrates the fallacy of the Petitioner's position. The only method by which this theory can be reconciled to the fact is to conclude that if the predecessor corporation was actually the transferor then it was in control of the new corporation "immediately after the transfer," and a reorganization within the meaning of the statute resulted.

See *Raybestos-Manhattan, Inc. v. United States*, 296 U. S. 60.

In that case the Court held that the transfer of corporate assets from two old companies to a new company in exchange for securities which were delivered directly to the old stockholders constituted a taxable issue and transfer of the stock in the new company, so that two stamp taxes were assessable—one on the original issue of the stock, theoretically to the old companies, and the other on the theoretical transfer by them to the old stockholders. If the same theory were applied to this case, it could readily be argued that momentarily during the passage of the stock from the new company to the Industrial bondholders the old company was the owner of such stock; and, therefore, "immediately after the transfer" in control of the new company.

2. The door is still open for the contention that the transaction here under consideration constituted a reorganization under the definition contained in Section 112

(g) (1) (A) of the Revenue Act of 1936 in that it was a "statutory merger or consolidation", since the Southwest Consolidated case did not involve Section 77-B of the Bankruptcy Act. That issue is being argued by Respondent in the companion cases *Helvering v. James Q. Newton Trust*, No. 645, and *Helvering v. James Q. Newton*, No. 646. This Respondent has preferred to rely on the applicability of Section 112 (b) (5) and has never felt justified in pressing this argument.

If the Court should find that this exchange was in connection with a "statutory merger or consolidation" or with a "reorganization" under any theory, the judgment of the lower court should be affirmed. As was stated in Footnote 2 in the case of *Bondholders Committee-Marlborough House v. Commissioner*, No. 128, 129, decided February 2, 1942:

"Though respondent apparently did not urge this point before the Board or the court below, it may of course support the judgment here by any matter appearing in the record. *LeTulle v. Scofield*, 308 U. S. 415, 421, 84 L. Ed. 355, 60 S. Ct. 313, and cases cited."

It is, however, the primary contention of the Respondent that all of the requirements under Section 112 (b) (5) have been met, that "reorganization" has no application to that section, and that thus this transaction constituted a non-taxable exchange.

### CONCLUSION.

The judgment of the lower Court should, therefore, be affirmed.

Respectfully submitted,

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## APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1643:

**SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.**

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

**SEC. 112. RECOGNITION OF GAIN OR LOSS.**

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

(3) **STOCK FOR STOCK ON REORGANIZATION.**—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(5) **TRANSFER TO CORPORATION CONTROLLED BY TRANSFEROR.**—No gain or loss shall be recognized if property is transferred to a corporation by one or

more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(g) *Definition of Reorganization.*—As used in this section and section 113—

(1) The term “reorganization” means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock; of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however effected.

(2) The term “a party to a reorganization” includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

(h) *Definition of Control.*—As used in this section the term “control” means the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.



## SEC. 117. CAPITAL GAINS AND LOSSES.

(b) *Definition of Capital Assets.*—For the purposes of this title, “capital assets” means property held by the taxpayer

(f) *Retirement of Bonds, Etc.*—For the purposes of this title, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

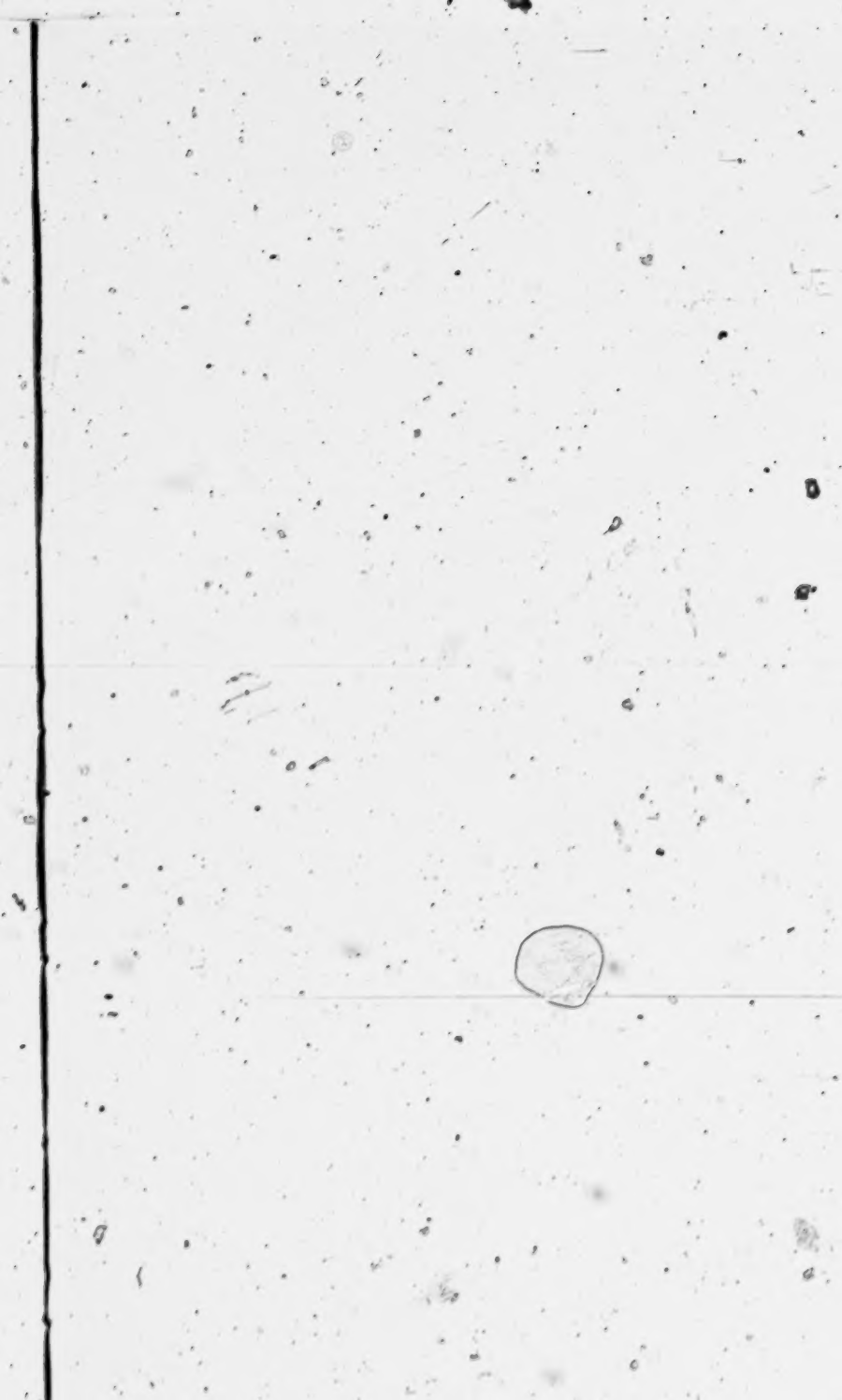
ART. 112 (b) (5)-1. *Transfer of property to corporation controlled by transferor.*—As used in section 112 (b) (5), the phrase “one or more persons” includes individuals, trusts or estates, partnerships and corporations (see section 1001); and to be in “control” of the transferee corporation such person or persons must own immediately after the transfer at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of such corporation. (See section 112 (h).) The phrase “immediately after the exchange” does not necessarily require simultaneous exchanges by two or more persons, but comprehends a situation where the rights of the parties have been previously defined and the execution of the agreement proceeds with an expedition consistent with orderly procedure.

*Example 1:* A owns certain real estate which cost him \$50,000 in 1920, but which has a fair market value of \$150,000 in 1936. He transfers this property to the M Corporation, a newly formed company, for all the latter’s capital stock. No gain or loss is recognized from the transaction.

*Example 2:* C owns a patent right worth \$25,000 and D owns a manufacturing plant worth

\$75,000. C and D organize the R corporation with an authorized capital stock of \$100,000. C transfers his patent right to the R Corporation for \$25,000 of its stock and D transfers his plant to the new corporation for \$75,000 of its stock. No gain or loss to C or D is recognized.

*Example 3:* B owns certain real estate which cost him \$50,000 in 1920, but which has a fair market value of \$200,000 in 1936. He transfers the property to the N Corporation in 1936 for 78 percent of all classes of stock of the corporation, the remaining 22 percent of the stock of the corporation having been issued by the corporation in 1933 to other persons for cash. B realizes a taxable gain of \$150,000 on this transaction. (See section 112 (h).)



No. 644

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*In the Supreme Court of the United States*

OCTOBER TERM, 1941

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GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

CEMENT INVESTORS, INC.

---

PETITION FOR REHEARING ON PETITION FOR A WRIT  
OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT

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# In the Supreme Court of the United States

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COURT OF APPEALS FOR THE TENTH CIRCUIT

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Comes now the Solicitor General, on behalf of the petitioner, and respectfully prays for a reconsideration by the Court of its order of February 9, 1942, denying certiorari herein.

This petition is filed (a) because the disposition of the case is inconsistent with the decision on February 2, 1942, in *Helvering v. Southwest Consolidated Corp.*, No. 286, and (b) because of the confusion and uncertainty which thereby have been created in the administration of the revenue laws.

This case involves a plan of reorganization adopted in 1936 in a proceeding under Section 77B



of the Bankruptcy Act. The debtor was The Colorado Fuel and Iron Company. The taxpayer owned certain of its bonds.<sup>1</sup>

Under the plan, the corporate assets were transferred to a new company. In return, the latter issued new income mortgage bonds and shares of common stock, which were distributed in exchange for the old bonds, and stock purchase warrants, which were distributed in exchange for the old stock.<sup>2</sup> The question is whether gain should be recognized upon the taxpayer's exchange of the old bonds for new bonds and stock.

This case was one of the group of test cases brought by the Government in order to obtain authoritative determinations respecting the tax consequences of creditor reorganizations of insolvent corporations. This end was substantially achieved with respect to transactions arising under the statutes prior to the Revenue Act of 1934, c. 277, 48 Stat. 680, although adversely to our contentions, by the decisions on February 2, 1942 in *Helvering v. Alabama Asphaltic Limestone Co.* and *Palm Springs Holding Corp. v. Commissioner*, Nos. 328

<sup>1</sup> The proceedings also involved The Colorado Industrial Company, a wholly owned subsidiary of The Colorado Fuel and Iron Company. The bonds referred to were originally issued by the subsidiary, but were unconditionally guaranteed by the parent both as to principal and interest. Virtually all of the assets of the subsidiary had been taken over by the parent in 1913.

<sup>2</sup> The new company also assumed the obligations upon an issue of general mortgage bonds.

and 503, respectively.<sup>3</sup> Similarly, the decision on the same day in *Helvering v. Southwest Consolidated Corp.*, No. 286, resolved the question with respect to transactions governed by the reorganization definition of the Revenue Act of 1934 and later statutes.

It was believed that the Court was withholding action on the petition for certiorari in this case until after its decisions in the group of cases already before the Court, and that this case would be disposed of in accordance with those decisions. The disposition of this case, however, appears to be inconsistent with the result in the *Southwest Consolidated* case, and has produced new uncertainty. It is important in the administration of the revenue laws that the situation be clarified.

1. The two cases arose under identical statutory provisions, and their facts correspond in all essential particulars. The ultimate issue in the *Southwest Consolidated* case was whether the basis of the assets in the old corporation was carried over to the new, whereas the ultimate question here is whether gain should be recognized upon the exchange of securities of the old corporation for securities of the new; but that ultimate issue in each case pivots upon whether there was a "reorganization" within the meaning of the statutory defini-

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<sup>3</sup> Cf. *Bondholders Committee, Marlborough Investment Co. v. Commissioner*, Nos. 128-129, decided the same day in favor of the Government on the basis of particular distinguishing facts.

tion, and that definition is identical in the Revenue Acts of 1934 and 1936, the statutes involved in the two cases. See Sections 112 (b) (3); 112 (g) (1); 113 (a) (7). In both cases, the stockholders of the old corporation received only stock purchase warrants in the new company; their interests were otherwise eliminated. In the *Southwest Consolidated* case, the new company, in return for the assets, issued warrants and paid cash, in addition to its common stock; here, the new company issued warrants and new bonds as well as common stock.\*

In the *Southwest Consolidated* case, the Court held that the transaction was not a reorganization within the definitions set forth in Section 112 (g) (1) (B), (C), (D), or (E) of the 1934 Act and that therefore the old basis would not carry over under Section 113 (a) (7). The opinion, moreover, expressly pointed out the error of the court below in its conclusion that there was a reorganization here under Section 112 (g) (1) of the 1936 Act.<sup>5</sup> Thus, to the extent that the decision below rested upon the statutory definition of reorganization, it

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\* While the transaction in the *Southwest Consolidated* case was effected in a receivership proceeding, and in the instant case, in a proceeding under Section 77B of the Bankruptcy Act, this difference in the "procedural devices" employed to carry out the plan cannot be material. Cf. *Helvering v. Alabama Asphaltic I' estone Co., supra*.

<sup>5</sup> The Court referred particularly to the conclusion below that there was a reorganization under Clause C. This was the only clause under which the court below found that there

is in conflict with the *Southwest* decision, and the Court's denial of certiorari leaves matters in a state of confusion. Although the court below purported to rest its decision also upon the alternative ground that the gain involved escaped taxation under Section 112 (b) (5), the application of those provisions is so highly doubtful as to call for clarification by this Court. It is not to be supposed that the reorganization provisions involved in the *Southwest Consolidated* case may be avoided by resort to Section 112 (b) (5). If the decision below is permitted to stand, the Government as well as taxpayers will be faced with the extraordinary result that although the old basis for the corporate assets will not carry over under the *Southwest Consolidated* case, taxation of the gain upon the exchange of the securities may nevertheless be avoided through Section 112 (b) (5). A result that is so incongruous should not be made to depend upon the inferences and conjectures surrounding the denial of a petition for certiorari.

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was a reorganization. The taxpayer has not urged the applicability of any other clause, and in its brief below, stated its agreement with our view that Clause A did not apply. See *Newton v. Commissioner*, 42 B. T. A. 473. It is obvious under the *Southwest* decision, that there could not be a reorganization here under Clause D or E; similarly there could not be one under Clause B because the new company issued both warrants and new bonds in addition to its common stock.

2. Every reorganization of any size is not only likely to produce a basis issue, but also is bound to produce numerous cases involving recognition of gain or loss upon the exchange of the securities by individual security holders. Denial of certiorari will mean that despite the Court's resolution of the basis issue, this corollary question must continue to be a subject of controversy and litigation. Heretofore, the uncertainty in this field has forced the Commissioner to take inconsistent positions in connection with these problems in order to protect the revenues. (See brief of the Government, *Helvering v. Southwest Consolidated Corp.*, pp. 10-11.) While we believe the decision below was erroneous, the Commissioner has no alternative, until the question is authoritatively determined, other than to continue the inconsistent practice of taxing gains and disallowing losses.

The question is pending at the present time in three different Circuit Courts of Appeals. In two instances, the Government is contending, as in the instant case, that gain must be recognized. *Commissioner v. Meyer Buchman* (C. C. A. 2d),\* and *Commissioner v. Albert E. and May K. Schwabacher* (C. C. A. 9th). In the third case, the Government has contended that a loss should not be

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\* This case involves an exchange of securities in the same Section 77B proceeding as the instant case.



recognized. *Miller & Paine v. Commissioner* (C. C. A. 8th).<sup>1</sup>

Moreover, although we believe that the basis issue was resolved in the *Southwest Consolidated* case, denial of certiorari here will doubtless produce further litigation on that question which normally would have been avoided. Excuse will be found for advancing specious points of distinction in the necessity of reconciling the apparent inconsistency between that decision and the Court's disposition of the Government's petition here. The petition for rehearing, filed by the taxpayer in the *Southwest Consolidated* case, itself, provides examples. See pp. 2-3, 5.

3. The error of injecting Section 112 (b) (5) into this situation is not merely emphasized by the inconsistency it produces but is shown by the inapplicability of its language. Section 112 (b) (5) applies only to transfers of "property" to a corporation. It assumes the continuance of that property in the hands of the transferee.\* Here, how-

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<sup>1</sup> In each of the cases a stipulation was entered into, deferring the proceedings until after this Court's disposition of the instant case and the two *Newton* cases. *Commissioner of Internal Revenue v. James Q. Newton Trust*, and *Commissioner of Internal Revenue v. James Q. Newton, Jr.*, Nos. 645 and 646, respectively. The stipulations did not require either party to be bound by the Court's action, however, nor did they preclude either party from thereafter urging any other points that might be relevant.

\* Cf. Section 113 (a) (8), providing the basis for "property" acquired by a corporation by the issuance of its stock or securities in connection with a transaction described in Section 112 (b) (5).

ever, the old bondholders, upon taking the new securities, surrendered their claims, and the obligations of the debtor companies were discharged. The bonds never existed as property in the hands of the new company. They were not transferred as such nor could they have constituted the consideration for the issuance of the securities of the new corporation. These securities, of course, were issued for the assets acquired from the old corporation\* (R. 133-135, 138, 139, 168, 190-191).

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\* *Portland Oil Co. v. Commissioner*, 109 F. (2d) 479 (C. C. A. 1st), certiorari denied, 310 U. S. 650, and *A. A. Birren & Son v. Commissioner*, 116 F. (2d) 718 (C. C. A. 7th), cited by the taxpayer as supporting the decisions below (Br. 4), each involved a transfer of an intangible to a corporation which received and held the intangible as its property; consequently, the two cases are plainly distinguishable.

On the other hand, the decision below, in applying Section 112 (b) (5), is thus inconsistent with *Fairbanks v. United States*, 306 U. S. 436, in which this Court held that the surrender of a bond for redemption did not constitute the sale or exchange of a capital asset. It is also inconsistent with the decisions holding that the surrender and cancellation of a secured claim, upon acquisition of the security, is not such a sale or exchange. *Bingham v. Commissioner*, 105 F. (2d) 971 (C. C. A. 2d); *Commissioner v. National Bank of Commerce*, 112 F. (2d) 946 (C. C. A. 5th); *Commissioner v. Spreckels*, 120 F. (2d) 517 (C. C. A. 9th); see *Commissioner v. Electro-Chemical E. Co.*, 110 F. (2d) 614, 616 (C. C. A. 2d), affirmed, 311 U. S. 513; cf. *Hale v. Helvering*, 85 F. (2d) 819 (App. D. C.). These cases turned on the ground that the surrender was not a transfer of property to the debtor.

It is respectfully submitted, therefore, that the order denying the petition for certiorari be vacated and that the petition be granted.

CHARLES FAHY,  
*Solicitor General.*

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I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,  
*Solicitor General.*

FEBRUARY 1942.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1941

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GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

JAMES Q. NEWTON TRUST

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GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

JAMES Q. NEWTON, JR.

---

PETITION FOR WRITS OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH  
CIRCUIT

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# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

JAMES Q. NEWTON TRUST

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

JAMES Q. NEWTON, JR.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH  
CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Tenth Circuit entered in the above cases on July 24, 1941.



## OPINIONS BELOW

The opinion of the Board of Tax Appeals, which appears at pages 8-21 and 17-29 of the respective records, is reported in 42 B. T. A. 473. The opinions of the Circuit Court of Appeals (R. 191, No. —; R. 47, No. —) are not yet reported.

## JURISDICTION

The judgments of the Circuit Court of Appeals were entered July 24, 1941. (R. 192, No. —; R. 48, No. —.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## STATEMENT

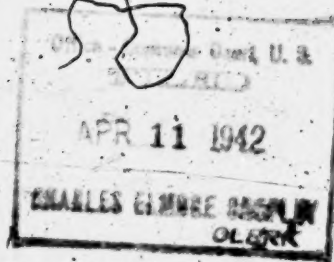
These cases involve precisely the same facts, except for the different taxpayers and amounts involved, and the same question as *Commissioner v. Cement Investors, Inc.* (C. C. A. 10th), decided July 24, 1941, not yet officially reported but found in 1941 C. C. H. Vol. 4, par. 9614, in which the Government is filing a petition for certiorari contemporaneously herewith. Writs of certiorari should issue in the instant cases for the reasons set forth in that petition.

Respectfully submitted.

CHARLES FAHY,  
*Acting Solicitor General.*

SEPTEMBER 1941.

FILE COPY



Nos. 645, 646

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1941**

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**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER**

**v.**

**JAMES Q. NEWTON TRUST**

---

**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER**

**v.**

**JAMES Q. NEWTON, JR.**

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**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT**

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**BRIEF FOR THE PETITIONER**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1941**

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**No. 645**

**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER**

**v.**  
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**v.**  
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**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
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**BRIEF FOR THE PETITIONER**

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**OPINIONS BELOW**

The opinion of the Board of Tax Appeals (No. 645, R. 12-18; No. 646, R. 22-29) is reported in 42 B. T. A. 473. The opinion of the Circuit Court of Appeals (No. 645, R. 44; No. 646, R. 47-48) is reported in 122 F. (2d) 416.

### JURISDICTION

The judgments of the Circuit Court of Appeals were entered July 24, 1941. (No. 645, R. 44-45; No. 646, R. 48). The petition for writs of certiorari was filed on September 23, 1941. Following denial on February 9, 1942, a petition for rehearing was filed on February 28, 1942, and the petition was granted on March 9, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Pursuant to a Section 77B plan, corporate assets were transferred to a new company, new bonds and stock distributed to former bondholders, and the stock interests eliminated except for the receipt of stock purchase warrants. The question is whether gain should be recognized upon the taxpayer's exchange of bonds for new bonds and stock. The answer depends upon (1) whether the exchange was tax-free under Section 112 (b) (3) of the Revenue Act of 1936, which in turn depends upon the question of whether the plan constituted a "reorganization" within the definition of Section 112 (g) (1); or (2) whether the exchange constituted a tax-free transfer under Section 112 (b) (5).

### STATUTES AND REGULATIONS INVOLVED

The provisions of the statutes and regulations principally involved are set forth in the Appendix to the Government's brief in *Helvering v. Cement Investors, Inc.*, No. 644. Additional provisions in-



volved herein are set forth in the Appendix, *infra*, pp. 10-12.

#### STATEMENT

These cases involve precisely the same facts, except for the different taxpayers and amounts involved, and the same ultimate issue as *Helvering v. Cement Investors, Inc.*, No. 644. The facts have been stated, and the Government's position with respect to the principal questions involved has been developed, in its brief filed in the *Cement Investors* case. The Court is respectfully referred to that brief.

The taxpayers in the instant cases, however, have advanced the further argument that the transaction constituted a "statutory merger or consolidation" within the meaning of Clause A of the reorganization definition of Section 112 (g) (1) of the statute. The Board of Tax Appeals rejected this contention, and the court below did not pass upon it. The point has not been discussed in our brief in the *Cement Investors* case, since that taxpayer expressly stated in its brief below its agreement with the Commissioner that Clause A did not apply. We are considering the contention here against the possibility that it may again be pressed in the instant cases.

#### SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the taxpayers' securities had been exchanged pursuant to a plan of "reorganiza-

tion," and that therefore gain would not be recognized.

(2) In holding that Section 112 (b) (5) precluded recognition of gain upon the exchange of the taxpayers' securities.

(3) In failing to hold that the gain realized upon the exchange of the taxpayers' securities should be recognized under Section 112 (a).

(4) In sustaining the decision of the Board of Tax Appeals.

#### **SUMMARY OF ARGUMENT**

Section 77B itself is not a merger or consolidation statute within the meaning of Clause A of Section 112 (g) (1) as interpreted by the treasury regulations. The applicable corporation statute here was the law of Colorado. The procedure required to effect a consolidation under that statute was not employed in effecting this plan. While Section 77B provides that a merger or consolidation may be employed as a means of effecting a plan, the record shows no reference to the use of such machinery.

#### **ARGUMENT**

**THE TRANSACTION DID NOT CONSTITUTE A "STATUTORY MERGER OR CONSOLIDATION" WITHIN THE MEANING OF CLAUSE A OF SECTION 112 (g) (1) OF THE REVENUE ACT OF 1936**

1. Beginning with the Revenue Act of 1934, Clause A of the reorganization definition was

amended to apply only to "a *statutory* merger or consolidation." (Italics supplied.) Prior thereto, the clause had included within the definition "a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation)".<sup>1</sup> Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 112 (i). In the light of the amendment, Clause A has now been interpreted by the Treasury Regulations to "refer to a merger or consolidation effected in pursuance of the corporation laws of the United States or a State or Territory or the District of Columbia." Treasury Regulations 94 (Revenue Act of 1936), Article 112 (g)-2. See also Treasury Regulations 103 (Internal Revenue Code), Article 112 (g)-2; Treasury Regulations 86 (Revenue Act of 1934), Article 112 (g)-2, as amended by T. D. 4585, XIV-2 Cum. Bull. 54 (1935).

Section 77B itself is plainly not such a law.<sup>2</sup> While it requires that a plan provide adequate means for its execution which may include a merger

<sup>1</sup> In the 1934 and subsequent acts, the parenthetical phrase was retained in modified form as Clause B. See S. Rep. No. 558, 73d Cong., 2d Sess., p. 10 (1939-1 Cum. Bull. (Part 2) 586, 598).

<sup>2</sup> Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as added by Act of June 7, 1934, c. 424, 48 Stat. 911, Sec. 77B (U. S. C., Title 11, Sec. 207):

or consolidation (Section 77B (b) (9)), it recognizes that the corporate power and authority to effect such a transaction is derived from the law which creates the corporation. The power to merge or consolidate must be found in that law. Section 77B confers jurisdiction upon the federal courts to sanction plans which direct the execution of various corporate steps in order to effect the reorganization, but the statute does not itself confer the necessary corporate powers or otherwise purport to give corporate transactions operative effect.<sup>3</sup> This is accomplished by the applicable corporation statute.<sup>4</sup>

2. The applicable corporation statute here was the law of Colorado, under which both the old companies and the new were incorporated. This statute contains specific provisions authorizing consolidations (Colorado Statutes, Ann. (1935), Vol. 2, c. 41, Sec. 54 (Appendix, *infra*)), but it is obvious that they were not employed in effecting the plan.

<sup>3</sup>A ready example of a federal corporation law containing consolidation provisions is the national bank laws. They provide for the consolidation of national banking associations formed under, and deriving their corporate powers from, federal law. Revised Statutes, Sec. 5133 (U. S. C., Title 12, Sec. 21); Revised Statutes, Sec. 5136, as amended (U. S. C., Title 12, Sec. 24); Act of November 7, 1918, c. 209, 40 Stat. 1048, as amended, Secs. 1, 2, 3 (U. S. C., Title 12, Secs. 33, 34, 34 (a)).

<sup>4</sup>These same comments also apply to the revision of Section 77B adopted in 1938 as Chapter X of the Act of June 22, 1938, c. 575, 52 Stat. 840, 883.

In order to have a consolidation under Colorado law, it is necessary to call a meeting of stockholders to vote upon the consolidation and to obtain the approval of three-quarters. A certificate of incorporation is then prepared, signed and acknowledged by at least three of the stockholders of each of the consolidating companies, which, *inter alia*, sets forth the facts of the consolidation and names the new directors. The properties of the consolidating companies are then transferred to the new company, and when this has been done, the directors of the consolidated company call in the stock of the consolidating companies, cancel it, and issue the new. Colorado Statutes, Ann., *supra*. These were not the steps taken in the instant case, as we shall show below.

Indeed, it is difficult to see how it would have been possible for the Colorado consolidation statute to be applied here. That statute contains no provisions permitting the elimination of stock interests or for the satisfaction or alteration of creditors' claims. On the contrary, it provides expressly that the new company shall "be responsible for and shall assume and pay all the just liabilities of each of the companies so consolidated". *Ibid*. These provisions necessarily conflict with the pattern and purposes of an insolvency reorganization under the Bankruptcy Act. They are patently inconsistent with what was done here.

3. Section 77B, as we have indicated, provides a number of means which may be employed in the



execution of the plan, of which a merger or consolidation is but one. These means also include "the transfer of all or any part of the property of the debtor to another corporation \* \* \* the satisfaction or modification of liens, indentures, or other similar instruments," and "the issuance of securities of either the debtor or any such corporation or corporations \* \* \* in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes." Section 77B (b) (9), *supra*.

These were the means employed here. The plan provided for the creation of a new corporation, which would acquire the assets of the old companies. Following confirmation of the plan, the court on June 20, 1936, entered an "Order Approving the Form of Documents and Directing the Transfer of Assets to, and the Issue of Securities and Assumption of Liabilities by, the New Company." (No. 644, R. 131-142.) The order directed the debtors, the reorganization trustee, and the indenture trustee for the Industrial bonds, to transfer all their interests in the assets of the enterprise to the new company (No. 644, R. 133) and directed the latter to issue the new securities to the order of the reorganization managers (No. 644, R. 134). The indenture trustee was further directed thereupon to execute and deliver to the new company a proper instrument satisfying and discharging the Industrial mortgage (No. 644, R. 135-136); the reor-

ganization managers were directed to distribute the new securities (No. 644, R. 139); and all creditors and stockholders were perpetually enjoined from prosecuting any claims against the new company (No. 644, R. 141). These steps were carried out. The new securities were issued to the reorganization managers as consideration for the assets, and distributed according to the plan. In the final decree all debts, liabilities of, and stock interests in, the old company were discharged, and any attempt to enforce them permanently enjoined (No. 644, R. 190-191).

Nowhere in the plan, or in any of the relevant instruments, is there any reference to a merger or consolidation. None was in fact involved.

#### CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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APRIL 1942.

## APPENDIX

Colorado Statutes, Ann. (1935), Vol. 2, c. 41:

§ 54. *Consolidation—How consummated—Not to affect debts.*—Any corporations, existing for any of the purposes enumerated in this chapter, may consolidate by uniting the properties and concerns of two or more corporations in one organization, having all the rights and privileges of this chapter, and amenable to all its liabilities, by complying with all the requirements herein provided, to-wit: Each corporation desiring to consolidate, each with the other, may, by its trustees or directors, or by the stockholders representing a majority of the stock, call a meeting of the stockholders, as provided in section 131 of this chapter, and vote upon the proposition of consolidation that shall be presented in writing, at such meeting, when if by a vote of at least three-fourths of the stock of each company severally, the proposition shall be approved, the trustees or directors shall thereupon elect their proportion of the directors, less one, that are to manage the affairs of the consolidated company, and upon the joint meeting of the directors so elected, the said directors shall elect one of the stockholders to be a director and act with them, and they jointly shall constitute a board of directors, who shall organize by electing their officers in accordance with law. They shall prepare a certificate of incorporation setting forth the facts of consolidation, together with all other matters required in original certificates of incorporation, naming therein the directors elected as herein provided, who shall serve for one year and until their successors are elected; and the said certificate of incorporation shall be signed and acknowledged by at :

least three of the stockholders of each of the consolidating companies. The certificate so signed and acknowledged shall be filed for record in the office of the secretary of state, and in each of the offices of the county recorders where the certificate of either of the companies so consolidated are on file. The trustees or directors of the consolidating companies shall, each by proper conveyance, convey to the consolidated company the property and effects of such companies, and shall deposit with the directors of the consolidated company all the transfer books, seals, books and papers of each of the companies so uniting. The directors of the consolidated corporation shall call in all the stock of each of the companies forming a part of the consolidation, cancel the same, and issue in lieu thereof the stock of the new organization in proportion of value of the old to the new, as provided in the plan of consolidation; provided, no stock shall be issued in lieu of old stock except upon presentation of the old stock or due proof of the loss or destruction of the old certificates of stock, and then only to the parties entitled thereto. When the companies have consolidated as herein provided, the stock of the companies so consolidated shall thereafter represent only its interest in the new organization, whether surrendered and exchanged or not, and shall be subject to all the liabilities of assessment and forfeiture that may pertain to the stock of the consolidated company, and the consolidated company shall be responsible for and shall assume and pay all the just liabilities of each of the companies so consolidated; and any corporation desiring to change its name, place of business, number of directors or trustees, or amount of capital stock; shall submit the question at an annual meeting, or a special meeting called for that purpose, in accordance with the

provisions of section 131 of this chapter. If, at any such meeting, three-fourths of all the stock of such corporation shall vote in favor of the proposed change, or changes, a certificate setting forth the fact, or facts, verified by the affidavit of the president of said corporation, and having the seal of the corporation affixed, shall be filed for record with the secretary of state and the recorder of the county where the principal business office of said corporation is located.

§ 55. *Publication of notice of consolidation.*—Such corporations shall, upon the filing of said certificates, cause to be published in some newspaper, in or nearest the county in which their principal office is located, a notice of such changes of organization, for three successive weeks.

§ 56. *Not to affect pending suits.*—Such change of name, place of business, increase or decrease of capital stock, increase or decrease of number of directors, managers or trustees, or consolidation of one corporation with another or with others, shall not affect suits pending in which such corporation or corporations shall be parties; nor shall such change affect causes of action, nor the rights of persons in any particular; nor shall suits brought against such corporation by its former name be abated.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 112 (g)-2. *Definition of terms.*—The application of the term "reorganization" is to be strictly limited to the specific transaction set forth in section 112 (g) (1). \* \* \*

The words "statutory merger or consolidation" refer to a merger or a consolidation effected in pursuance of the corporation laws of the United States or a State or Territory or the District of Columbia.





Nos. 645, 646

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**In the Supreme Court of the United States**

OCTOBER TERM, 1941

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GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

JAMES Q. NEWTON TRUST

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GUY T. HELVERING, COMMISSIONER OF INTERNAL  
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---

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT

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**BRIEF FOR THE RESPONDENT**

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT

---

**BRIEF FOR THE RESPONDENT**

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**OPINIONS BELOW**

The opinion of the Board of Tax Appeals (No. 645, R. 12-18; No. 646, R. 22-29) is reported in 42 B. T. A. 473. The opinion of the Circuit Court of Appeals (No. 645, R. 44; No. 646, R. 47-48) is reported in 122 F. (2d) 416.

### JURISDICTION

The judgments of the Circuit Court of Appeals were entered July 24, 1941. (No. 645, R. 44-45; No. 646, R. 48). The petition for writs of certiorari was filed on September 23, 1941. Following denial on February 9, 1942, a petition for rehearing was filed on February 28, 1942, and the petition was granted on March 9, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

The taxpayers exchanged their first mortgage bonds for new income bonds and common stock of a new company pursuant to a plan of reorganization under Section 77B of the Bankruptcy Act. The question is whether gain was recognized for income tax purposes upon this exchange. The answer depends upon (1) whether the exchange was tax-free under Section 112 (b)(5) of the Revenue Act of 1936; or (2) whether the plan of reorganization under 77B was a "reorganization" within the definition of Section 112 (g)(1) so that the exchange was tax-free under Section 112 (b)(3).

### STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 32-39.

### STATEMENT

These cases involve precisely the same facts, except for the different taxpayers and amounts involved, as *Helvering v. Cement Investors, Inc.*, No. 644. The facts have been stated in the Government's brief in the *Cement Investors* case and the bulk of the Government's argument in this case, except for one point re-

lied upon by the taxpayers here, has been advanced in its brief in that case and has not been repeated in its brief filed in the instant cases. It is therefore necessary to refer to the Government's brief in both the *Cement Investors* cases and these cases.

Since Exhibits D through N, both inclusive, of the record in these cases are identical with the corresponding exhibits in the *Cement Investors* case, it has been agreed that these exhibits need not be reprinted. (No. 645, R. 197). It is therefore necessary to refer to the record in the *Cement Investors* case for these exhibits.

There is agreement as to the facts. The statement of the case by the Government (No. 644 Pet's Br. pp. 2-6) is a fair summary of the essential facts except as to the amounts involved. In the reorganization, the James Q. Newton Trust surrendered \$152,000 face amount of Colorado Industrial Company first mortgage 5% bonds due August 1, 1934, in exchange for \$60,800 principal amount of income mortgage bonds and 3,040 shares of common stock of the new company. James Q. Newton, Jr., surrendered \$10,000 principal amount of the bonds for \$4,000 principal amount of the new bonds and 200 shares of stock.

#### SUMMARY OF ARGUMENT

1. This case involves an exchange of securities. It does not involve the determination of the basis of transferred assets. It does not involve, except secondarily, the problem of whether there was a reorganization. It is a case of whether gain or loss was recognized for income tax purposes on the exchange by the taxpayers of their old bonds for new bonds and stock of the new company. The provisions of Section 112 (b) (5)<sup>1</sup> apply

<sup>1</sup> Revenue Act of 1936, C. 690, 49 Stat. 1648; Sec. 112 (b) (5).

precisely to the facts and under that Section no finding of a reorganization is necessary. The exchange of securities by the taxpayers was tax-free under that section.

There is no conflict or inconsistency between the decision in the *Southwest Consolidated Corporation* case<sup>2</sup> and the application of Section 112 (b) (5) here. That section did not apply to the *Southwest* case. The correlative disposition of basis cases and recognition cases is not affected by the application of Section 112 (b) (5) here.

The taxpayers transferred their bonds, which were valuable property rights, to the new company in exchange for all the new securities, pursuant to the plan of reorganization under Section 77B<sup>3</sup>. The exchange of the old securities for new and the transfer of the legal title to the physical assets by the old company to the new one were separate phases of the reorganization plan as a whole. The transfer of the bonds was the valuable consideration for the issuance of the new securities in exchange therefor. The bonds evidenced the full priority rights of the bondholders in the physical assets. That was the reason why the new securities were issued to the bondholders and to no one else.

The bondholders were also the transferors of the physical assets. The conveyance was made by their agents and representatives, on their behalf, and for their benefit. It was the carrying out of the legal formalities necessary to make the bondholders the complete legal owners of the assets. They were the owners

<sup>2</sup> Decided February 2, 1942; 86 L. Ed. 512.

<sup>3</sup> Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as added by Act of June 7, 1934, c. 424, 48 Stat. 911; Sec. 77B (U. S. C. Title 11, Sec. 207).

of the assets, which could not have been transferred by anyone else.

2. The transaction was also a statutory consolidation within the definition of Clause A of Section 112 (g) (1) and, therefore, no gain or loss was recognized thereon under Section 112 (b) (3). The two old corporations consolidated; they merged their identity into a new corporation pursuant to the provisions of a plan of reorganization under Section 77B. The definition in Clause A does not require that a merger or consolidation be effected under the statute creating corporate life in order to be "statutory". Section 77B is, and was intended by Congress to be, a statute within the definition so that mergers or consolidations effected under it are "statutory".

#### ARGUMENT

*Introductory*—The Circuit Court held for the taxpayers on the two grounds that (1) there was a reorganization under Section 112 (g) (1) C and (2) there was a non-taxable exchange under Section 112 (b) (5). (122 Fed. (2d) 380). The decision in the *Southwest Consolidated* case (supra) established that the definition in Clause C of Section 112 (g) (1) does not apply here since, although the bondholders had stepped into the shoes of the old stockholders and had acquired their proprietary interest in the insolvent company, they had not become "stockholders" within the strict wording of Clause C. Accordingly, the Respondents do not urge the applicability of Clause C.

Granted that the consistent treatment of the correlative issues of basis on the one hand and recognition of gain or loss on the exchange of securities on the other, was intended and is desirable, the alleged in-



consistent treatment of the two issues in this case and in the *Southwest Consolidated* decision does not exist. The alleged confusion on the basis issue is not caused by the application of Section 112 (b) (5) to the facts here, but by the failure of the Commissioner to recognize that the old basis may be carried over under Section 112 (b) (5) *notwithstanding* there is no reorganization.

# I

THE TRANSACTION WAS A NON-TAXABLE EXCHANGE WITHIN THE MEANING OF SECTION 112 (b) (5).

Section 112 (b) (5) applies literally to the facts. Under Section 112 (b) (5):

- (1) Property.
- (2) Must be transferred to a corporation by one or more persons:
- (3) Solely in exchange for stock or securities of such corporation.
- (4) Immediately after the exchange, such person or persons must be in "control" of the corporation.
- (5) But in case of an exchange by two or more persons, the amount of the stock and securities received by each must be substantially in proportion to his interest in the property prior to the exchange.

Detailed analysis of the transaction in terms of the provisions of this Statute show the presence of every element necessary to come within its strictest terms:

- (1) *Property.* The property transferred was the bonds owned by the taxpayers. Bonds are "securities"

within the meaning of that term in the Revenue Act. (*Helvering v. Watts*, 296 U. S. 387; 56 Sup. Ct. 275; 80 L. Ed. 289.). Securities are property. Intangible property as well as physical property may be the property transferred under Section 112 (b) (5).<sup>4</sup> In many of the cases where Section 112 (b) (5) has been held applicable, the "property" transferred has been bonds or stocks. *Commissioner v. Newberry Lumber and Charcoal Co.*, 6th Circ. 94 Fed. 2nd, 447; *Frederick L. Leckie v. Commissioner*, 37 B. T. A. 252; *Von's Investment Co., Ltd. v. Commissioner*, C. C. A. 9th; 92 Fed. 2nd 861 (1937).

The Commissioner has also disregarded a long line of cases in arguing that the section does not apply to an exchange of securities. The property transferred may be stock, *The Griswold Co.*, 33 B. T. A., 537; it may be defaulted bonds, *Frederick L. Leckie*, 37 B. T. A. 252; it may be creditors claims in an insolvent corporation, *Rockford Brick and Tile Co.*, 31 B. T. A. 537; it may be other securities, *Commissioner v. Freund*, (C. C. A. 3) 98 Fed. 2nd 201, 21 A. F. T. R. 181; it may include money, *Portland Oil Company v. Commissioner*, 109 F (2d) 479 (C. C. A. 1st), certiorari denied, 310 U. S. 650. *George P. Skouras v. Commissioner*, 45 B. T. A. No. 159 (notes); *Louis W. Gunby Inc. v. Helvering*, 122 Fed. (2d) 203 (C. C. A. D. C.) (1941) (securities).

(2) *Property was transferred to a corporation by one or more persons.* The Taxpayers surrendered their Industrial bonds to the distributing agents in exchange for the new securities. (No. 644, R. 168-170). The distributing agents may not have actually deliv-

<sup>4</sup> See Regulations 94, Article 112 (b) (5) (1), Example 2, (patent right).

ered these bonds to the new corporation so that it in turn might deliver them to the indenture trustee for cancellation. But it is wholly immaterial whether they delivered the bonds to the new company, so that it could in turn surrender them to the indenture trustee, or themselves delivered the bonds to the indenture trustee. Whichever method was actually used, the bonds were surrendered for cancellation and the mortgage was released in order that the physical assets which had been transferred to the new company could be freed of the lien of the mortgage. If the bonds were surrendered to the distributing agents rather than to the new company, it was for the purpose of simplifying the transaction and the bonds were received by the distributing agents on behalf of the new company and for its benefit. The distributing agents had no beneficial interest in the old securities or the new securities and were merely a conduit for the convenience of all the parties concerned. (No. 644, R. 138-140.)

Since the distributing agents received all the stock of the new company and, pursuant to direction of the court, voted the stock in favor of the creation of the new income mortgage, (No. 644 R. 123, 127) it is quite clear that they held the old bonds for the benefit of the new company which could not create the new mortgage until the old lien had been wiped off the assets. Had anything intervened to interrupt the transaction, each step of which had to be carried out "simultaneously" (No. 644 R. 133-136) the paramount rights of the bondholders would have been asserted and they would have established their claim to the property (bonds) transferred to the new company or its agents.

(3) *Property was transferred to a corporation solely in exchange for stock or securities in such corpora-*

tion. The term "stock or securities" includes stock and securities. Regulations 94, Article 112 (g) (2). The bondholders received income mortgage bonds and common stock of the new corporation and nothing else. There was no "boot" received; all the securities presently issued (except the warrants) were issued to the old bondholders. (No. 645 R. 11; No. 644 R. 70.) The government apparently admits this and there is no argument as to the application of this part of the statute.

(4) *Immediately after the exchange, the transferors were in control of the corporation.* The bondholders received all the stock of the new corporation. No stock was issued in the reorganization to anyone else. Therefore, there was one hundred per cent "control" of the new corporation immediately after the exchange as that term is defined in Section 112 (h) of the Revenue Act of 1936. There is apparently no dispute on this point.

(5) *The securities received by each transferor were in proportion to his interest in the property prior to the exchange.* Under the plan of reorganization, each Industrial bondholder was treated exactly alike. Non-assenting bondholders who did not accept the plan (who represented less than 25% of the outstanding bonds) were bound by its terms (Sec. 77B; 11 U. S. C. Sec. 207 (b) (9)). Under the plan each bondholder received exactly the same amount of income mortgage bonds and common stock for each old bond held by him. Consequently, the amount of new securities received by each old bondholder was not merely "substantially" but exactly "in proportion to his interest in the property prior to the exchange." This point is not in dispute.

The proportionate interest requirement is satisfied not only with respect to the Respondents and other old bondholders similarly situated, but also from the point of view of all security holders of the old companies. The express purpose of Section 77B is to determine the true equity ownership of the property of the debtors involved according to the equities of each class of security holder. Each security holder of the two old companies who was affected by the plan surrendered his securities in exchange for new securities in the new company and the stock or securities received by him were *exactly* proportionate to his interest in the property prior to the exchange. In other words, the proceeding under Section 77B was an actual adjudication of the respective interests of all the security holders in the properties transferred to the new company.

Under the revenue laws, words should be given their ordinary and usual meaning unless there is some definite reason to the contrary. (*Von Weise, et al. v. Commissioner*, 69 Fed. 2d 439). Section 112 (b) (5) according to its strict terms and the decided cases applies both literally and in its essential purpose to the facts of this case. The embarrassment which it has caused the Commissioner in his efforts to collect a tax here is evident in the arguments he has advanced to meet it.

The most important argument advanced by the Commissioner is that a decision here in favor of the taxpayer based on Section 112 (b) (5) will conflict with the decision of this court in the *Southwest Consolidated* case, (*supra*). The contention is that Section 112 (b) (5) cannot be applied to this case because if it is and the exchange is tax free, then the old asset basis will carry over under Section 113 (a) (8) and that will be



inconsistent with the *Southwest Consolidated* case, because there, on similar facts, a new basis was established. There are two answers to this alleged inconsistency: First, the fact that the exchange is tax free under Section 112 (b) (5), does not make this a reorganization contrary to the *Southwest Consolidated* doctrine since there need be no reorganization under Section 112 (b) (5). Second, if 112 (b) (5) applies to the *Southwest Consolidated* case, then it was wrongly decided and the exchange should have been tax free and the old basis for the assets should have been carried over to the transferee.

Respondents agree that if Section 112 (b) (5) applied to the facts of the *Southwest Consolidated* case, then the alleged inconsistency between the decision of this Court there and the decision of the Circuit Court here, as the Commissioner argues, would exist. But Section 112 (b) (5) does not apply to the facts of the *Southwest Consolidated* case. In the first place, the property transferred to the new corporation by the bondholders committee in that case was not transferred "solely in exchange for stock or securities" within Section 112 (b) (5). As this Court pointed out in the *Southwest* case, "solely" means just that. The property was actually transferred for securities and cash which was raised by a bank loan and was used to pay off non-participating security holders who owned obligations in the face amount of \$440,000.00. In substance, it was the same as though the transferee had paid cash and stock for the properties. In the second place, as this Court clearly pointed out in its opinion in the *Southwest* case:

"The rights of the security holders against the old corporation were drastically altered by the

sale made pursuant to the plan." (86 L. Ed. p. 515.)

This alteration of the rights of various classes of creditors and security holders is entirely inconsistent with Section 112 (b) (5).

Plainly, the alleged inconsistency between the *Southwest Consolidated* case and this case does not exist. The facts of the *Southwest* case do not fit any of the tests of reorganization defined in Section 112 (g) (1) for various reasons fully discussed by this Court. They also fail to fit the test of Section 112 (b) (5). There are no broad principles by which these questions can be decided. Each case depends upon its own particular facts. The Court found a reorganization in the *Alabama Asphaltic Limestone* case,<sup>5</sup> because the facts there fitted the definition in Section 112 (i) (1) A under the 1928 Act. The Court likewise found a reorganization in the *Palm Springs Holding Corporation* case<sup>6</sup> under the 1932 Act for similar reasons. The Court found no reorganization within the statutory definition in the *Bondholders Committee (Marlborough House)* case,<sup>7</sup> because none of the definitions of reorganization applied to the facts nor did Section 112 (b) (5) apply to those facts. Likewise, the facts in the *Southwest* case did not fit any of the definitions in the 1934 Act and obviously did not fit the requirements of Section 112 (b) (5).

There is a reorganization or a tax free exchange wherever the Statute applies and there is none where the Statute does not apply. Section 112 (b) (5) fits the facts of this case, but does not fit the facts of the

<sup>5</sup> Decided February 2, 1942; 86 L. Ed. 504.

<sup>6</sup> Decided February 2, 1942; 86 L. Ed. 507.

<sup>7</sup> Decided February 2, 1942; 86 L. Ed. p. 509.

*Southwest Consolidated* case. There is no inconsistency. Nothing in the Commissioner's lengthy argument concerning the "synchronization" of the taxing statutes, or the importance of "uniformity" has any direct bearing on these facts.

For these reasons the government's argument with respect to the "correlative disposition" of basis questions under Section 113 and recognition questions under Section 112, falls to the ground. The reorganization and exchange provisions and the basis provisions are correlative. But the Commissioner refuses to recognize the hard fact that it is not necessary for there to be a reorganization under Section 112 (b) (3) for a corporation to retain its old basis. The basis provisions of Section 113 do not apply *solely* to reorganizations under Section 112 (b) (3). They also apply to other tax-free transfers. Section 113 (a) (8) applies expressly to exchanges under Section 112 (b) (5). (Appendix page 35.) That section is just as important a part of Section 112 as is Section 112 (b) (3). One does not override the other, nor is the application of Section 112 (b) (5) made in any sense "doubtful" simply because Section 112 (b) (3) does not apply.

The essential fact is that under Section 113 the old basis may be carried over in the hands of the transferee if there has been a reorganization *or* if there has been a tax-free exchange under Section 112 (b) (5). It may be emphatically clear, as it was in the *Southwest Consolidated* case, that there was no reorganization on any ground; still, there may be a tax-free exchange and the old basis may carry over if Section 112 (b) (5) applies. The argument developed by the Commissioner, reduced to its simplest terms, is that Section 112 (b) (3) and 112 (b) (5) are in fundamental con-

flict because under the former no reorganization may be found and a new basis will result whereas on the same facts Section 112 (b) (5) may apply and the old basis will carry over. The obvious answer is that both sections are complementary and if *either* applies, the old basis is carried over under Section 143.\*

The other argument advanced by the Commissioner is that the "property" transferred in exchange for the securities was the physical assets, not the bonds, and that the bondholders may not be considered the transferors of the physical assets received by the new company. The contention is that the bondholders had nothing to do with the transfer of assets which was made by the indenture trustee, the reorganization managers and the old corporations. It is said that they were the transferors. (Br. pp. 15-17; 28.)

It is the Respondent's position that the "property" transferred to the new company by the bondholders in exchange for the new securities was the bonds. But if the property transferred be considered the physical assets, those assets also were actually transferred by the bondholders. To deny this is to ignore the realities of the transaction.

Under the doctrine of the *Alabama Asphaltic Limestone Company* case and the *New Haven and Shore-*

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\* The legislative history of Section 112 (b) (5) lends no support to the Commissioner's theory that that section cannot apply where there is no reorganization. On the contrary, the section has been retained unchanged since the Revenue Act of 1928 (Section 112 (b) (5); 45 Stat. 791) and originated in Section 202 (b) of the Revenue Act of 1918 (40 Stat. 1057) in order that no gain or loss should be deemed to occur "when a person or persons owning property receive in exchange for such property stock of a corporation formed to take over such property." The exemption was clearly independent of, although developed concurrently with, the reorganization provisions. See: Report—Senate Finance Committee (65th Cong., 3d Sess., S. Rept. 617) and Report—Conference Committee (65th Cong., 3d Sess., H. Rept. 1037) in Seidman's *Legislative History of Federal Income Tax Laws* (1938) pp. 899.

*line Railroad* case (*supra*), the bondholders had stepped into the shoes of the old stockholders and had "effective command over the disposition of the property." Their "full-priority" rights in those assets under the *Boyd* and *Los Angeles Lumber Company* cases<sup>9</sup> were paramount. They were as much the owners of the assets before the transfer as after. The transfer "did nothing but recognize officially what had been true in fact." The old corporations were mere shells. They had nothing left but their corporate existence. Their joinder in the conveyance was a mere formality because they had nothing left to convey, nothing to transfer. The rights of the indenture trustee and the reorganization managers in respect of the assets were merely those of an agent or trustee for the bondholders holding the legal title. The transfer of the physical assets was made by the agents of the bondholders for the sole benefit and account of the bondholders and on their behalf. The transfer of the rights of ownership in those assets, and the only value given for the new securities, was when the bondholders surrendered the bonds evidencing those rights on the account of the new company. If some persons other than the bondholders transferred those assets to the new company then the new securities, issued in exchange therefor, should have been issued to those persons and not to the bondholders.

Clearly, if the bondholders had bid in the property at a sale, as in the *New Haven and Shore Line Railroad* case 121 F. (2d) 985, and then turned around and conveyed the property to the new company in exchange for its securities, there would be no question as to their hav-

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<sup>9</sup> *Northern P. R. Co. v. Boyd*, 228 U. S. 482; *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106.



ing transferred the property. In the old days, before Section 77B, this is what would have been done. Section 77B removed the necessity of this step. Under Section 77B the power to bind a dissenting minority to the terms of the plan obviates the need of cash payment to those security holders who do not want to participate in the plan and removes the necessity for the costly and cumbersome procedure of foreclosure and sale. It would have been "a peculiarly fatuous formality" to have required the assets to pass through the bondholders to the new company. Surely, the fact that this old and cumbersome procedure was not necessary under the provisions of Section 77B does not mean that the bondholders were any less the transferors of the assets than as if the old procedure had been followed. Clearly the whole force behind the transfer of the assets was the bondholders, who were carrying out "the prescribed legal formalities necessary to make themselves the complete legal owners of the property." *L. Hand, J. in New Haven and Shore Line Railroad Co. v. Commissioner*, 121 Fed. (2d) 985, 987.

The substance of the transaction and not its form should determine the applicability of the taxing statute. (*Gregory v. Helvering*, 293 U. S. 465, 469.) If the value of the securities owned by these taxpayers when they were exchanged had been less than their cost and the taxpayers had sought to establish a loss, the Commissioner would have rightly insisted that substance and not form should control and that the exchange was tax-free under Section 112 (b) (5). Thus, in a number of cases, the courts have disregarded form and applied Section 112 (b) (5) in support of the Commissioner's contention that substance should control. (*Gunby, Inc. v. Helvering*, 122 Fed. (2d) 203; *Labrot v.*

*Burnet, Commissioner*, 57 Fed. (2d) 413; *Snowden v. McCabe*, 111 Fed. (2d) 743; *Kuldell v. Commissioner*, 97 Fed. (2d) 725.) Here, in order to circumvent the precise application of Section 112 (b) (5), the Commissioner has been constrained to argue (Br. p. 20-21) that the transfer involved two phases: the transfer of the corporate assets and the exchange of securities, notwithstanding the established rule that the transaction must be considered as a whole and should not be "atomized" into separate steps. (*Helvering v. Southwest Consolidated Corp.*, *supra*). Surely the heart of this entire transaction was the transfer by the bondholders to the new company of their debt and the rights, evidenced by their bonds, in exchange for the new securities.

Finally, the argument is advanced that the bondholders transferred nothing, that they merely surrendered their old claims for cancellation, and that to come within Section 112 (b) (5) the property transferred must continue as property in the hands of the transferee. It is said that the property interest in the old securities was terminated and never passed in a situation analogous to the redemption and satisfaction of a bond or the compromise and settlement of a note (Br. pp. 21-22). But the facts are not so and the cases cited do not apply. The bonds were not surrendered to the maker and satisfied in exchange for the collateral security as in *Commissioner v. Spreckels*, 120 Fed. (2d), 517, *Commissioner v. National Bank of Commerce*, 112 Fed. (2d), 946, and *Bingham v. Commissioner*, 105 Fed. (2d) 971. There was no compromise of the debt at less than face value as in *Hale v. Helvering*, 85 Fed. (2d) 819. The assets were not transferred by the debtor companies to the mortgagee-bondholders. The bonds

were not surrendered up for cancellation and extinguishment by the bondholders to the debtors. The bonds were not redeemed, paid, compromised or settled; they were *exchanged*.

The important distinction to be made between those cases and the instant case is that here the bondholders did not receive payment of their debts but exchanged their debts for a continuing interest in the new corporation. *Miller and Paine v. Commissioner of Internal Revenue*, 42 B. T. A. 586, 593 (1940) (On appeal to 8th Circuit Court of Appeals).<sup>10</sup>

The difficulty with this theory is illustrated by the fact that it is hard to describe this transaction without using the word "exchange." (Pet's Br., pp. 16-17). There was no termination of old rights and creation of new. There was an exchange of property. The old bonds were securities which evidenced certain property rights in the assets by virtue of the debt and the terms of the indenture. When the rights of the bondholders changed and became paramount, (*Alabama Asphaltic Limestone Company* case, *supra*) the bonds, although physically the same securities, acquired new rights:

"This case is an interesting illustration of a situation where, presumably for "administrative" purposes and to protect the revenues (Br. No. 644 p. 26), the argument of the Commissioner was the direct opposite of that advanced here. In the *Miller and Paine* case the taxpayer exchanged his bonds and stock in a financially embarrassed corporation for new stock in a new company. The taxpayer claimed a bad debt deduction on the authority of the *Bingham* case (*supra*) and *Hale v. Helvering* (*supra*). The Board of Tax Appeals sustained the Commissioner's position that Section 112 (b) (5) applied saying: "In the instant case there can be no question but that the creditors . . . transferred their notes to the New York corporation and received in exchange therefor solely stock in the New York corporation. In other words, they did not receive payment of their debts, but exchanged their debts for a continuing interest in the new corporation. This is the sort of transaction where no gain or loss is recognized, provided the conditions required by Section 112 (b) (5) of the Revenue Act of 1934 are met." (42 B. T. A. 593) (Italics supplied). The Commissioner evidently takes either side of this argument depending in each case upon "whose ox is gored."

the right to step into the place of the old stockholders; the right of full dominion over the assets; and the right to dispose of the property subject to the court's control. These rights were valuable property rights and they had a market value. When they were transferred to the new company, all its securities were issued in exchange for them; they were the *value* given for those securities. Everything depended upon the transfer of those rights of the bondholders. Without that, the physical assets could not have been transferred to the new company, the new mortgage could not have been created, the old mortgage could not have been released, and the new securities could neither have been created nor issued.

## II

THE TRANSACTION CONSTITUTED A "STATUTORY MERGER OR CONSOLIDATION" WITHIN THE MEANING OF CLAUSE A, SECTION 112 (g) (1) OF THE REVENUE ACT OF 1936.

(1) Before both the Board of Tax Appeals and the Circuit Court, the Commissioner argued vigorously that there could be no reorganization here because the necessary continuity of interest was lacking. Presumably, the decisions of this court in the *Alabama Asphaltic Limestone Co.* case (*supra*) and the *Southwest Consolidated Corp.* case have silenced this contention. Upon the authority of those decisions and the denial of certiorari in *Helvering v. New Haven & S. L. R. Co.* (Feb. 9, 1942) it is submitted that this issue is no longer open to argument. "Quite clearly, if there was continuity of interest under the Revenue Act of 1928 in the *Alabama Asphaltic* case, and there would have been the same in the *Southwest Consolidated* case under the law, (86 L. Ed., p. 514) there would likewise be con-

tinuity of interest under the Revenue Act of 1928 in this case. By inference this court admitted as much when it said in the *Southwest Consolidated* case:

"The contrary conclusion was reached in *Commissioner of Internal Revenue v. Cement Investors* (C. C. A. 10th) 122 Fed. (2d) 380, 384, on the theory that the bondholders of the insolvent predecessor company could be regarded as its 'stockholders' within the meaning of § 112 (g) (1) (C), since they had acquired an equitable interest in the property and were empowered to supplant the stockholders. We have adopted that theory in *Helvering v. Alabama Asphaltic Limestone Co.*, — U. S. —, ante, 504, 62 S. Ct. —, *supra*, in determining whether the bondholders had retained a sufficient continuity in interest so as to bring the transaction within the statutory definition of merger or consolidation contained in the revenue acts prior to 1934."

Furthermore, it is evident that the transaction here would have been considered a "consolidation" within the meaning of that term in the revenue acts prior to 1934. The *Pinellas Ice & Cold Storage Co.* case (287 U. S. 462) established that in the revenue acts prior to 1934, the terms "merger or consolidation" included transactions "beyond the ordinary and commonly accepted meaning of those words." And the *Alabama Asphaltic Limestone* case (*supra*), established that "Insolvency reorganizations are within the family of financial readjustments embraced in those terms as used in this particular statute." (86 L. Ed., p. 506.)

Under the definition prior to the 1934 amendments there was clearly a consolidation here. The fact that



the word "consolidation" was not used in describing the plan, and the fact that the Court did not direct articles of consolidation to be filed under the Colorado Statute—these do not mean that the transaction was something other than a consolidation. As the definitions in the *Pinellas* case and in *Cortland Specialty Co. v. Commissioner* (60 F. (2d) 937) show<sup>11</sup> it is impossible to define a consolidation without describing precisely what happened in this case. Thus, all the assets of the two companies, the Industrial company and the Fuel company, were conveyed to the new company; the new company continued to carry on the business of the two old companies; all the securities and stock of the old companies with a minor exception were cancelled and the new company assumed the liabilities of the two old companies. In other words, the two old companies were consolidated into a new company which was created by direction of the court, and the consolidating corporations were extinguished.

(2) Granted that there would have been a consolidation of the two old companies into the new within the definition under the Revenue Act of 1928, the problem is the effect of the amendments of the definition in the Act of 1934 which admittedly were designed to restrict its scope. (Paul, *Studies in Federal Taxation* (3rd Series) pp. 36, et seq.) The Revenue Act of 1934 amended the definition of clause A by adding the word "statutory."<sup>12</sup> The meaning of this amendment was un-

<sup>11</sup> "In a merger one corporation absorbs the other and remains in existence while the other is dissolved. In a consolidation a new corporation is created and the consolidating corporations are extinguished." (57 Fed. (2d) 188, 190.)

"A consolidation involves a dissolution of the companies consolidated and a transfer of corporate existence and franchises to a new company." (60 Fed. (2d) 937, 939.)

See also: *Von Weise v. Commissioner*, 69 F. (2d) 439, 442.

<sup>12</sup> Cf. Revenue Act, 1928, Section 112. (1) (1) (A) and Revenue Act, 1934, Section 112 (g) (1) A.

certain. It was not clear what the word "statutory" was intended to include. This uncertainty was illustrated by the fact that the Regulations first published<sup>13</sup> were later amended to read as follows:

"The words 'statutory merger or consolidation' refer to a merger or consolidation effected in pursuance of the corporation laws *of the United States* or a state or territory or the District of Columbia. (Italics supplied.)

In the earlier version of the regulations, the italicized words were omitted. This amendment was effected by Treasury Decision 4585 (XIV—2 Cum. Bull. 54—1935). Article 112 (g) (2) of Regulations 86 under the Revenue Act of 1934 were retained unchanged in Regulations 94, under the Revenue Act of 1936.

The amendment of the Regulations by Treasury Decision 4585, *supra*, emphasized the fact that the Treasury understood the term "statutory merger or consolidation" was meant to include mergers or consolidations carried out under federal statutes as well as the state corporation statutes and it was generally understood to have that effect.<sup>14</sup>

(3) The intent of Congress in adopting the amendments in the Revenue Act of 1934 was two fold. At the hearings a strong plea had been made by a subcommittee of the Ways & Means Committee of the House<sup>15</sup> for the total elimination of the reorganization provisions from the statute. But the fact that the

<sup>13</sup> Regulations 86, Article 112 (g) (2).

<sup>14</sup> See Paul and Mertens, *Law of Federal Income Taxation*, Vol. 2, Section 17.70, page 162 and footnote 99. See also Fahey: *Income Tax Definition of Reorganization*, 39 Columbia Law Review 933, 960, (1939).

<sup>15</sup> Report Ways & Means Subcommittee (73d Cong., 2d Sess., H. Rept., Dec. 4, 1933).

country was in the depths of financial depression and that elimination of the provisions would permit taxpayers to take large losses, thus drastically shrinking the revenues, led the Committee to change its mind. It determined, first, to limit the reorganization provisions so that legitimate reorganizations might be permitted; and, second, to reduce tax avoidance by restricting the provisions so that "astute lawyers" could not "take advantage of these provisions by arranging in the technical form of a reorganization, within the statutory definition, what were really sales."<sup>16</sup>

(4) As an example of the type of "legitimate reorganizations required in order to strengthen the financial condition of the corporation," which the new reorganization provisions were designed to permit, the House report *supra* mentions the following:

"A few examples will bring out the reasons for the action of the committee. Thus, as a result of the *Emergency Banking Act*, a number of banks have found it necessary to strengthen

<sup>16</sup> Report—Ways and Means Committee, 73rd Cong., 2d Sess., H. Rept. 704:

"The committee proposes to limit the application of the reorganization provisions by two principal changes. . . . In the second place, the definition of a reorganization has been restricted so that the definition will conform more closely to the general requirements of corporation law, and will limit reorganizations to (1) statutory mergers and consolidations; (2) transfers to a controlled corporation, 'control' being defined as an 80-percent ownership; and (3) changes in the capital structure or form of organization.

"By these limitations the committee believes that it has removed the danger that taxable sales can be cast into the form of a reorganization, while at the same time, legitimate reorganizations, required in order to strengthen the financial condition of the corporation, will be permitted. Furthermore, the retention of the other reorganization provisions will prevent large losses from being established by bondholders and stockholders, who receive securities in a newly reorganized enterprise which are substantially the same as their original investments.

See also: Report—Senate Finance Committee, 73rd Cong., 2d Sess., S. Rept. 558 (pp. 16-17).

their condition by merging or consolidating. These mergers have materially aided the banking situation in these various communities. The provisions of the bill will enable these plans to be carried out without the recognition of gain or loss for income tax purposes, whereas if the provisions were omitted entirely, the participating shareholders would be entitled to large losses for tax purposes. Likewise, many corporations have defaulted upon the dividends on their cumulative preferred stock, or upon the interest on their bonds. These corporations, in order to obtain necessary credit from the banks, are arranging with their preferred stockholders to accept new common stock, and with their bondholders to accept noncumulative preferred stock in place of preferred stock or bonds now held. If the reorganization provisions were omitted from the bill, these stockholders and bondholders could take large losses, although they still retain an interest in the corporation." (Report—Ways & Means Committee (73d Cong., 2d Sess., H. Rept. 704, pp. 13-14). (Italics supplied.)

The Emergency Banking Act,<sup>17</sup> the correct name of which is the "Bank Conservation Act," was passed at a time of nation-wide financial panic when the country's banking structure was on the verge of collapse. It was emergency legislation designed to meet emergency needs. Section 207 of that act established a new method for the reorganization of banks in financial difficulties. It is quoted in the Appendix p. 38. Under the old consolidation statute (12 U. S. C. §§ 33, 34, 34(a)), an

<sup>17</sup> March 9, 1933, c. 1, Tit. II, § 201, 48 Stat. 2; 12 U. S. C. § 201-213; Appendix p. 38.

elaborate system was set forth whereby, upon the merger or consolidation of two national banks, or a national and state bank, the shares of non-assenting shareholders could be appraised by three appraisers and approved by the Comptroller of the Currency and if the value so appraised was not satisfactory the shares could ultimately be sold at public auction. (See 12 U. S. C. § 33.) The new law superseded this statute and set up a new and radically different arrangement for reorganizing banks. It provided that if certain percentages of the creditors, depositors or stockholders agreed to a plan which the Comptroller of the Currency was satisfied was "fair and equitable," the non-assenting stockholders, creditors and depositors were fully bound and subject to the provisions of the plan and were treated as if they had consented to it. It was a new concept. It superseded the old law.

The mention of the Emergency Banking Act in the committee reports (*supra*) shows that Congress considered that statute a typical reorganization statute which it intended should be included within the revised definition of reorganization in the Revenue Act of 1934. Congress clearly contemplated that mergers and consolidations effected under the provisions of that law should be considered "statutory" and tax-free.

Section 77B of the Bankruptcy Act is very similar in its underlying purpose and method to the Emergency Banking Act. It did for ordinary business corporations what the Bank Conservation Act did for banks. The novelty of Section 77B was that upon submission to the federal court having jurisdiction of a plan which appeared to be "fair and equitable" to all classes of security holders, and upon approval of the plan by the necessary percentages of interested persons,



the plan would become binding upon the non-assenting minority to the same extent as if they had agreed to it. Like the Emergency Banking Act, Section 77B created a new, simplified procedure for reorganizing corporations in financial difficulties and hundreds of corporations availed themselves of its provisions.

Although the Emergency Banking Act applied to the reorganization of national banks which derive their corporate powers from the federal government under the National Bank Act,<sup>18</sup> the act itself was an exercise of the bankruptcy power of the government under the constitution. (*Miller v. National Chautauqua County Bank*, 240 App. Div. 169; 270 N. Y. S. 522). The exercise of this bankruptcy power superseded the consolidation provisions of the statute affecting national banks; it overrode the rights of the minority stockholder formerly protected by section 33 of the National Bank Act. It no longer mattered what the charter or the law creating the bank provided in this respect; it was superseded by the new reorganization provisions under the bankruptcy power.

Similarly under Section 77B (App. p. 35) the bankruptcy power supersedes state laws and grants to the court having jurisdiction the right to consolidate "the properties of the debtor with those of another corporation" or to direct "the merger or consolidation of the debtor into or with another corporation or corporations." (App. p. 36.) Once the state-chartered corporation becomes insolvent or bankrupt and the federal bankruptcy court acquires jurisdiction over the property of the debtor, the bankruptcy power is paramount and exclusive. What authority or jurisdiction granted

<sup>18</sup> 12 U. S. C. § 21 et seq.

the original charter creating the corporation becomes unimportant.

(5) The Commissioner argues (Br. 5-7) that the term "statutory merger or consolidation" should be construed to mean: *merged or consolidated under the law creating the corporation*. The Respondents contend that the term should be construed (in order to effectuate the undoubted intent of Congress) to mean: *deriving the power to merge or consolidate from a statute*.

The narrow construction of the term urged by the Commissioner has little to recommend it. The expressed intent of Congress was to permit *bona fide* reorganizations required to strengthen the financial condition of corporations to have the benefit of the reorganization provisions. If Congress intended the word "statutory" to apply only to those mergers or consolidations effected under the law creating the corporation, why did it use as an example of a "statutory reorganization" one effected under the Bank Conservation Act, which was not the same law of the United States which created the banks which were consolidated or merged under it? If Congress intended the phrase to apply to consolidations under that law, it must be presumed to have intended the same result under an analogous law—Section 77B.

There are many federal laws authorizing mergers and consolidations. They include laws authorizing the consolidation of common carriers (49 U. S. C. § 5), the consolidation of telephone companies (47 U. S. C. § 221), the consolidation of state banks with national banks (12 U. S. C. § 34(a)) and others.<sup>19</sup> Mergers or con-

<sup>19</sup> See Fahey: 39 Columbia Law Rev., 933, 946.

solidations under all of these laws must be "statutory."<sup>20</sup> Thus, under the Interstate Commerce Act, a consolidation of two common carriers may be ordered by the Interstate Commerce Commission. The power to consolidate is vested in the Commission under the act. Surely the fact that the carriers involved derive their charter from state law does not mean that the consolidation is any less "statutory" than it would be if carried out under the state law. The state law is superseded. It has no power over the subject matter.

Congress cannot have intended the phrase "statutory merger or consolidation" to apply to some federal statutes and not others. It clearly intended the word to include mergers or consolidations carried out under the provisions of any statute, state or federal. The obvious intent was to allow *bona fide* reorganizations carried out due to business exigencies under the provisions of statutes, whether the Bank Conservation Act mentioned in the Committee Reports, or Section 77B of the Bankruptcy Act, or other similar statutes.

(6) The position of the Commissioner that 77B reorganizations are not "statutory" brings about wholly arbitrary and absurd results. Section 77B is probably the most famous reorganization statute ever enacted. Under the Commissioner's contention, however, mergers or consolidations effected under this statute require the recognition of gain or loss, whereas those effected under state laws permit non-recognition. Thus, in large bankruptcies and reorganizations, where large losses are usually sustained and non-recognition

<sup>20</sup> The Interstate Commerce Commission (under § 5, Title 49, U. S. C.), determines the legality and desirability of proposed consolidations of common carriers. It may then "enter an order approving and authorizing such consolidation, merger, . . . or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."

of gain or loss is really desirable in order to prevent losses of revenue to the Treasury, the Commissioner's position requires recognition; but if there is the saving grace of technical compliance with the merger and consolidation laws of any state or territory, (however clumsy and inadequate the provisions of those laws may be to effect their purpose), then the tax benefits of being "statutory" arise. This is directly contrary to the intent of Congress and is precisely what it was seeking to prevent.<sup>21</sup>

No state statute contains provisions for the elimination of stock interests or the readjustment of corporate structure possible under the bankruptcy powers of the Federal Government.

It would have been futile to attempt a consolidation here under the Colorado Statute. The persons in control of the situation and having full priority power were the bondholders, and nothing could be done without their consent no matter what the stockholders may have wanted to do or how large a percentage of them approved the articles of consolidation. The charters of the old corporations were merely tools in the hands of the bankruptcy court to be used or discarded as the circumstances warranted.

(7) The consolidation of the Industrial company and the Fuel company into the new company was certainly statutory in the sense that it was consummated pursuant to the provisions of Section 77B. The whole transaction was carried out and effected by the Federal District Court under its authority and jurisdiction under 77B. The Federal District Judge for the District

<sup>21</sup> Statement of the Acting Secretary of the Treasury regarding the preliminary report of a sub-committee of the Committee on Ways & Means, 73d Cong., 2d Sess., p. 10.

of Colorado, who authorized and directed the reorganization in the instant case, thus described the transaction in a subsequent opinion, briefly summarizing the history of the reorganization:

"In due course, a plan of reorganization was filed, a pertinent provision of which called for the organization of a new company, The Colorado Fuel & Iron Corporation . . . The New Company was accordingly *organized under the supervision of the Court, which prescribed the terms of the certificate of incorporation, by-laws and all other steps necessary to complete its organization*. Its Articles of Incorporation state it was to take over and operate the business of the Colorado Fuel & Iron Company, then in reorganization . . .

"The New Company, a creature of the court, was under its care until July 1, 1936 . . .

"I believe in the point I made at the argument, i.e., that the plaintiff was an arm or creature of the court previous to June 30, 1936, and not subject to the tax. Sec. 77B, Art. X, Sec. 216, says a plan of reorganization may provide that *the court, in the execution of a plan, may create and use one or more other corporations organized or thereafter to be organized and may, in effect, dictate the charter of such new corporation . . .*"  
(*The Colorado Fuel & Iron Corporation v. Nicholas*, 28 Fed. Supp. 449, 450.)

The Commissioner's position is that if the Court had chosen to direct the two companies to file articles of consolidation under the Colorado Statute, the transaction here would have been a statutory reorganization. But because the Court organized a new company



and directed the transfer of the old company's assets to it, the Commissioner contends that the transaction was not "statutory" and must be taxed. Surely this Court will not endorse a theory so inconsistent with the Congressional intent or so at variance with the essential nature of the transaction itself.

### CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

RICHARD M. DAVIS,  
QUIGG NEWTON, JR.,  
NEWTON, DAVIS, DRINKWATER & HENRY,  
*Counsel for Respondent.*

April, 1942

## APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

### SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

(3) *STOCK FOR STOCK ON REORGANIZATION.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *SAME—GAIN OF CORPORATION.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) *TRANSFER TO CORPORATION CONTROLLED BY TRANSFEROR.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(g) *Definition of Reorganization.*—As used in this section and section 113.—

(1) The term "reorganization" means (A) a statutory merger or consolidation, or (B) the

acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however, effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

(h) *Definition of Control*.—As used in this section the term "control" means the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

SEC. 113 [as amended by Section 807 of the Revenue Act of 1938, c. 289, 52 Stat. 447].

#### ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property*.—The basis of property shall be the cost of such property; except that—

(6) *TAX-FREE EXCHANGES GENERALLY*.—If the property was acquired, after February 28, 1913, upon an exchange described in section 112 (b) to (e), inclusive, the basis (except as provided in paragraph (15) of this subsection) shall be

the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112 (b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

(7) TRANSFERS TO CORPORATION.—If the property was acquired—

(A) after December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or

securities of the transferee as the consideration in whole or in part for the transfer.

(8) **PROPERTY ACQUIRED BY ISSUANCE OF STOCK OR AS PAID-IN SURPLUS.**—If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as added by Act of June 7, 1934, c. 424, 48 Stat. 911:

**SEC. 77B. CORPORATE REORGANIZATIONS.**—• • •

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise; • • • (9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation or to other corporations, or the consolidation of the properties of the debtor with those of another corpora-



tion, or the merger or consolidation of the debtor into or with another corporation or corporations, or the retention of the property by the debtor, the distribution of assets among creditors or any class thereof, the satisfaction or modification of liens, indentures, or other similar instruments, the curing or waiver of defaults, extension of maturity dates of outstanding securities, the change in interest rates and other terms of such securities, the amendment of the charter of the debtor, and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; (10) may deal with all or any part of the property of the debtor and may include any other appropriate provisions not inconsistent with this section.

(h) Upon final confirmation of the plan, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge, and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the debtor or the other corporation or corporations provided for by the plan, or, if no trustee has been appointed, when retained by the debtor pursuant to the plan or transferred by it to the other corporation or corporations provided for by the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the court may direct the trustee or trustees, or if there be no trustee, the debtor and any mortgagee, the trustee of any obligation of the debtor, and all other proper

and necessary parties, to make any such transfer or conveyance, and may direct the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Such final decree shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid. \* \* \* (U. S. C., Title 11, Sec. 207.)

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 112 (b) (5)-1. *Transfer of property to corporation controlled by transferor.*—As used in section 112 (b) (5), the phrase “one or more persons” includes individuals, trusts or estates, partnerships and corporations (see section 1001); and to be in “control” of the transferee corporation such person or persons must own immediately after the transfer at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of such corporation. (See section 112 (h).) The phrase “immediately after the exchange” does not necessarily require simultaneous exchanges by two or more persons, but comprehends a situation where the rights of the parties have been previously defined and the execution of the agreement proceeds with an expedition consistent with orderly procedure.

*Example 1:* A owns certain real estate which cost him \$50,000 in 1920, but which has a fair market value of \$150,000 in 1936. He transfers this property to the M Corporation, a newly formed company, for all the latter's capital stock. No gain or loss is recognized from the transaction.

*Example 2:* C owns a patent right worth \$25,000 and D owns a manufacturing plant, worth \$75,000. C and D organize the R corporation with an authorized capital stock of \$100,000. C transfers his patent right to the R Corporation for \$25,000 of its stock and D transfers his plant to the new corporation for \$75,000 of its stock. No gain or loss to C or D is recognized.

*Example 3:* B owns certain real estate which cost him \$50,000 in 1920, but which has a fair market value of \$200,000 in 1936. He transfers the property to the N Corporation in 1936 for 78 percent of all classes of stock of the corporation, the remaining 22 percent of the stock of the corporation having been issued by the corporation in 1933 to other persons for cash. B realizes a taxable gain of \$150,000 on this transaction. (See section 112 (h).)

Bank Conservation Act. (March 9, 1933, c. 1, Tit. II, paragraph 201, 48 Stat. 2. . . .

**SECTION 207. REORGANIZATION OF BANKS.**—In any reorganization of any bank under a plan of a kind which, under existing law, requires the consent, as the case may be, (a) of depositors and other creditors or (b) of stockholders or (c) of both depositors and other creditors and stockholders, such reorganization shall become effective only (1) when the Comptroller of the Currency shall be satisfied that the plan or reorganization is fair and equitable as to all depositors, other creditors and stockholders and is in the public interest and shall have approved the plan subject to such conditions, restrictions and limitations as he may prescribe and (2) when, after reasonable notice of such reorganization, as the case may require, (A) depositors and other creditors of such bank representing at least 75 per cent in amount of its total deposits and other liabilities as shown by the books of the bank or (B) stockholders owning at least two-thirds of

its outstanding capital stock as shown by the books of the bank or (C) both depositors and other creditors representing at least 75 per cent in amount of the total deposits and other liabilities and stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank, shall have consented in writing to the plan of reorganization: . . . In any reorganization which shall have been approved and shall become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 112 (g)-2. *Definition of terms.*—The application of the term "reorganization" is to be strictly limited to the specific transaction set forth in section 112 (g) (1). . . .

The words "statutory merger or consolidation" refer to a merger or a consolidation effected in pursuance of the corporation laws of the United States or a State or Territory or the District of Columbia.

Nos. 645, 646

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**In the Supreme Court of the United States**

OCTOBER TERM, 1941.

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GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

JAMES Q. NEWTON TRUST

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GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

v.

JAMES Q. NEWTON, JR.

---

PETITION FOR REHEARING ON PETITION FOR WRITS OF  
CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE TENTH CIRCUIT

---



**In the Supreme Court of the United States**

**OCTOBER TERM, 1941**

---

**No. 645**

**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER**

**v.**

**JAMES Q. NEWTON TRUST**

---

**No. 646**

**GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER,**

**v.**

**JAMES Q. NEWTON, JR.**

---

**PETITION FOR REHEARING ON PETITION FOR WRITS OF  
CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE TENTH CIRCUIT**

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Comes now the Solicitor General, on behalf of the petitioner, and respectfully prays for a reconsideration by the Court of its orders of February 9, 1942, denying certiorari in these causes.

The problem here is identical with that presented in *Helvering v. Cement Investors, Inc.*, No. 644, the cases differing only in the identity of

the taxpayers involved. Our petition herein is based on the same grounds as those which we have advanced in our petition for rehearing on the petition for a writ of certiorari in the *Cement Investors, Inc.*, case, to which the Court is respectfully referred.

It is respectfully submitted, therefore, that the orders denying the petition for certiorari in the instant causes be vacated and that the petition be granted.

CHARLES FAHY,  
*Solicitor General.*

I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,  
*Solicitor General.*

FEBRUARY 1942.

P. 1.

# SUPREME COURT OF THE UNITED STATES.

Nos. 644, 645 and 646.—OCTOBER TERM, 1941.

644 Guy T. Helvering, Commissioner of  
Internal Revenue, Petitioner,  
vs.  
Cement Investors, Inc.

645 Guy T. Helvering, Commissioner of  
Internal Revenue, Petitioner,  
vs.  
James Q. Newton Trust.

646 Guy T. Helvering, Commissioner of  
Internal Revenue, Petitioner,  
vs.  
James Q. Newton, Jr.

On Writs of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Tenth Circuit.

[June 1, 1942.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

The issue presented by these cases is whether under § 112(b) (5) of the Revenue Act of 1936 (49 Stat. 1648, 1678, 26 U. S. C. A. *Int. Rev. Acts*, p. 855) ~~§ 112(b) (5)~~ the gain of the taxpayers from the transactions in question should be recognized.

The taxpayers owned first mortgage bonds of Colorado Industrial Co. which was a wholly owned subsidiary of the Colorado Fuel and Iron Co. The bonds were guaranteed both as to principal and interest by the parent company. After defaults on these bonds and on other bonds issued by the parent company each company filed a petition under § 77B of the Bankruptcy Act. A plan of reorganization was formulated by committees of the security holders. It provided for the formation of a new company to which all the assets of the two debtor companies would be transferred. The new company would assume the obligations of the bonds of the old parent company, Colorado Fuel and Iron Co., and issue income bonds and common stock in exchange for the bonds of the old subsidiary company, Colorado Industrial Co. The stockholders

of the debtor companies would receive no interest in the new company; but in exchange for their stock they would receive warrants for the purchase of shares of the new company. Approval of the plan by the requisite percentage of security holders was obtained. The plan was confirmed by the court in April, 1936 and was duly consummated as follows: The debtor companies, the bankruptcy trustee, and the trustee under the indenture securing the bonds of the old subsidiary company conveyed the assets of the debtors to the new company. The new securities were issuable to or on the order of the reorganization managers who were acting, as stated in the plan, as "agents" of the security holders. The reorganization managers effected an exchange of the old securities for the new on or about September 1, 1936. Immediately after the consummation of the plan all of the issued shares of the new company (552,660 shares of common out of an authorized issue of 1,000,000 shares) belonged to the former holders of the bonds of the old subsidiary company. No stock was issued by the new company to other parties until October, 1936 when 37 shares were issued on exercise of the warrants. By June, 1938 only 465 shares had been issued to holders of the warrants.

Each of the taxpayers in these cases exchanged his Colorado Industrial Co. bonds for income bonds and common stock of the new company. In each case the fair market value of the new securities exceeded the basis of the old. The Commissioner determined deficiencies on the ground that the profit from the exchange was a taxable gain. The Board of Tax Appeals held for the taxpayers. See 42 B. T. A. 473. The Circuit Court of Appeals affirmed (122 F. 2d 380, 416) holding, *inter alia*, that the exchange met the requirements of § 112(b)(5). We granted the petitions for certiorari because the application of § 112(b)(5) to receivership or bankruptcy reorganizations raised important problems in the administration of the income tax law.

It is plain from *Helvering v. Southwest Consolidated Corp.*, 315 U. S. —, which involved identical definitions of the term "reorganization" as are involved here, that this transaction does not meet the requirements of § 112(g)(1)(B) of the 1936 Act.<sup>1</sup> The

<sup>1</sup> In *Helvering v. Southwest Consolidated Corp.*, *supra*, no question as to the applicability of § 112(b)(5) was involved. The only question raised or considered by the Board or the Circuit Court of Appeals or passed on by this Court was whether or not the transaction in question qualified as a "reorganization" under § 112(g)(1) of the 1934 Act.

assets of the old companies were not acquired in exchange "solely" for voting stock of the new company, since income bonds and warrants were also issued. It is also clear that the requirements of § 112(g)(1)(C) were not satisfied since clause C "contemplates that the old corporation or its stockholders, rather than its creditors, shall be in the dominant position of 'control' immediately after the transfer and not excluded or relegated to a minority position." *Id.*, p. —. But it does not necessarily follow that § 112(b)(5) is inapplicable.

Sec. 112(b)(5) provides:

"No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange."

"Control" is defined in § 112(h) to mean

"the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation."

If it may be said that property was transferred by the bondholders to the new corporation, then the other requirements of § 112(b)(5) were satisfied. For the bondholders, as owners of all of the outstanding shares of the new corporation were in "control" of it "immediately after the exchange." And it has not been disputed that the stock and income bonds acquired by each bondholder were substantially in proportion to his interest in the assets of the debtor companies prior to the exchange. Petitioner, however, maintains that the only transfer within the meaning of § 112(b)(5) was effected by the debtor companies, the bankruptcy trustee, and the indenture trustee; and that the exchange of the bonds for the new securities was merely part of the mechanics for consummation of the plan and not an exchange by which "property" was transferred to the new corporation. Though we agreed with the latter proposition, it would not necessarily follow that the requirements of § 112(b)(5) were not met.

In case of reorganizations of insolvent corporations the creditors have the right to exclude the stockholders entirely from the



reorganization plan. When the stockholders are excluded and the creditors of the old company become the stockholders of the new, "it conforms to realities to date their equity ownership" from the time when the processes of the law were invoked "to enforce their rights of full priority". *Helvering v. Alabama Asphaltic Limestone Co.*, 315 U. S. —. Under that approach the ownership of the equity in these debtor companies effectively passed to these creditors at least when § 77B proceedings were instituted. But however their interest in the property may be described, it clearly was an equitable claim in or to it. It was that equitable interest with which the plan dealt. The transfer of the properties of the debtor companies to the new corporation was made pursuant to that plan. The plan was approved by the requisite percentage of these creditors, as required by § 77B(e)(1) of the Bankruptcy Act. Thus it is fair to say that the property transferred was property in which the creditors had an equitable interest and that the transfer was made with their authority and on their behalf. Certainly "property" as used in § 112(b)(5) includes such an interest in property. And we see no reason to conclude that a beneficial owner of, or equitable claimant to, property is precluded from consummating an exchange which qualifies under § 112(b)(5) merely because the actual conveyance is made by his trustee or title holder. In situations comparable to this one the Board of Tax Appeals has held that § 112(b)(5) is applicable. *Leckie v. Commissioner*, 37 B. T. A. 252; *Miller & Paine v. Commissioner*, 42 B. T. A. 586. Cf. *Rockford Brick & Tile Co. v. Commissioner*, 31 B. T. A. 537. We accept its view.

The legislative history of § 112(b)(5) supports that conclusion. Sec. 112(b)(5) and the "reorganization" provisions are rather closely related. See Miller, Hendricks, and Everett, *Reorganizations and Other Exchanges in Income Taxation* (1931), ch. 6. While the "reorganization" provisions are restricted to inter-corporate transactions, § 112(b)(5) is not so confined, since the phrase "one or more persons" includes "individuals, trusts or estates, partnerships and corporations". Treasury Reg. 94, Art. 112(b)(5)-1. But there is no indication that the "reorganization" provisions were designed as the exclusive method of deferring recognition of gain or loss in all cases of corporate readjustments or reorganizations. The history of § 112(b)(5) makes clear that it too was designed to function in that field (*American Compress &*

*Warehouse Co. v. Bender*, 70 F. 2d 655, 657-658) and to permit deferment of gains or losses where "there has been a mere change in the form of ownership" or where the taxpayer has not "closed out a losing venture." *Portland Oil Co. v. Commissioner*, 109 F. 2d 479, 488. Sec. 112(b)(5) derives from § 202(c)(3) of the 1921 Act. 42 Stat. 229, 230. Its legislative history shows that it was designed to permit "readjustments"<sup>2</sup> without present recognition of gain or loss by allowing property to be transferred to a controlled corporation by an individual, a partnership, a corporation, or others.<sup>3</sup> See Hearings, Senate Committee on Finance, Proposed Revenue Act of 1921, 67th Cong., 1st Sess., May 9-27, 1921, pp. 536-537, 546, 557-558; Magill, *Taxable Income* (1936), pp. 123-131. If a transaction meets the requirements of § 112(b)(5), the basis of the property in the hands of the acquiring corporation is the same as it would be in the hands of the transferor. § 113(a)(8). See *P. A. Birren & Son, Inc. v. Commissioner*, 116 F. 2d 718. A similar result obtains in case of a transaction which qualifies as a "reorganization". See § 113(a)(7)(B). And the theory underlying the two basis provisions is the same. Miller, Hendricks, and Everett, *op. cit.*, pp. 304, 404; S. Rep. No. 398, 68th Cong., 1st Sess., Committee Reports on the Revenue Acts, 1913-1938, Int. Rev. Bull., pp. 278-279. The close relationship between § 112(b)(5) and the "reorganization" provisions is further evidenced by the fact that they overlap to a degree. Thus a transaction which meets the requirements of clause B or clause C of § 112(g)(1) may also qualify under § 112(b)(5). In short, the "reorganization" provisions do not furnish the exclusive methods for securing a deferment of gains or losses arising out of transactions popularly known as corporate readjustments or reorganizations. The instant transaction comes fairly within the family of business readjustments for which § 112(b)(5) was designed. Hence the fact that it cannot meet the statutory standards of a "reorganization" does not necessarily mean that it cannot qualify as an "exchange", any more than the failure to satisfy one clause of the "reorganization" provisions means that none can be satisfied.

<sup>2</sup> H. Rep. No. 356, 67th Cong., 1st Sess.; S. Rep. No. 275, 67th Cong., 1st Sess., Committee Reports on the Revenue Acts, 1913-1938, Int. Rev. Bull., pp. 175-176, 188-189.

<sup>3</sup> For the result which would otherwise obtain in such situations see *Insurance & Title Guarantee Co. v. Commissioner*, 36 F. 2d 842 and cases cited.

But the argument seems to be that even though there was an "exchange" which met the requirements of § 112(b)(5), there was nevertheless a gain which is taxable. That gain, it is suggested, arose from the acquisition by the taxpayers of their equitable interest in the properties in substitution for their old bonds. And it is argued that unlike the situation which obtains under the "reorganization" provisions (*Helvering v. Alabama Asphaltic Limestone Co., supra*), § 112(b)(5) covers only the exchange itself and not the antecedent steps in connection with a plan of reorganization. Thus the contention seems to be that since a gain arose from a transaction which was separate and distinct from and anterior to the exchange of property for the new securities, it must be recognized under the general rule of § 112(a). We express no view on that contention. The deficiencies were not assessed on that transaction but only upon the exchange of stock and securities in the new corporation for bonds of the old. We will not consider here for the first time the question whether a tax liability may have been incurred under § 112(a) by reason of the earlier transaction, a question not fairly within the issues as framed by the Commissioner and hence not decided below. Cf. *Helvering v. Wood*, 309 U. S. 344, 349.

*Affirmed.*

A true copy.

Test:

*Chief Supreme Court, U. S.*